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5

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RUSSELL BRIMER  
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF MARIN  
10 UNLIMITED CIVIL JURISDICTION  
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12 RUSSELL BRIMER,

13 Plaintiff,

14 v.

15 NATIONAL ENTERTAINMENT  
COLLECTIBLES ASSOCIATION, INC.; and  
16 DOES 1-150, inclusive,

17 Defendants.  
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Case No. CIV1200562

**[PROPOSED] CONSENT JUDGMENT**

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and National Entertainment Collectibles Association, Inc.**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer  
4 (“Brimer” or “Plaintiff”) and defendant National Entertainment Collectibles Association, Inc.  
5 (“NECA” or “Defendant”), with Plaintiff and Defendant collectively referred to as the “Parties”  
6 and each individually referred to as a “Party.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

16 Brimer alleges that NECA manufactured, imported, distributed, sold and/or offered for  
17 sale mugs with colored artwork or designs containing lead on the exterior in the State of  
18 California without the requisite health hazard warnings. Additionally, Brimer alleges that  
19 NECA manufactured imported, distributed, sold and/or offered for sale carrying cases with  
20 vinyl/pvc handles containing di(2-ethylhexyl)phthalate (“DEHP”) in the State of California  
21 without the requisite health hazard warnings. Lead and DEHP are listed pursuant to Proposition  
22 65 as known to the State of California to cause birth defects and other reproductive harm.

23 **1.5 Product Description**

24 The products that are covered by this Consent Judgment are defined as follows: (1) mugs  
25 with colored artwork or designs containing lead (“Exterior Decorations”), including, but not  
26 limited to, *The Twilight Saga Eclipse “Jacob in Tattoo” Mug (#6 34482 22332 1)*, which  
27 NECA manufactured, imported, distributed, sold and/or offered for sale in the State of  
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1 California, hereinafter referred to as the “Noticed Lead Products;” and (2) carrying cases with  
2 vinyl/pvc handles containing DEHP including, but not limited to, *The Twilight Saga New Moon*  
3 *Vintage Carrying Case “Jacob and the Dreamcatcher,”* #21367 (#6 34482 21367 4), which  
4 NECA manufactured, imported, distributed, sold and/or offered for sale in the State of  
5 California, hereinafter referred to as the “Noticed DEHP Products.” Noticed Lead Products and  
6 Noticed DEHP Products are hereinafter collectively referred to as the “Products.”

7 **1.6 Notice of Violation**

8 On October 11, 2011, Brimer served NECA and various public enforcement agencies  
9 with a document entitled “60-Day Notice of Violation” (“Initial Notice”) that provided the  
10 recipients with notice of alleged violations of Proposition 65 for failing to warn consumers that  
11 the Noticed Lead Products exposed users in California to lead. To the best of the Parties’  
12 knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set  
13 forth in the Initial Notice.

14 On February 5, 2013, Brimer served NECA and various public enforcement agencies  
15 with a document entitled “Supplemental 60-Day Notice of Violation” (“Supplemental Notice”) that provided the recipients with notice of alleged violations of Proposition 65 for failing to  
16 warn consumers that the Noticed DEHP Products exposed users in California to DEHP and that  
17 the Noticed Lead Products exposed users in California to lead. To the best of the Parties’  
18 knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set  
19 forth in the Supplemental Notice. The Initial Notice and the Supplemental Notice are  
20 hereinafter referred to as the “Notices.”

21 **1.7 Complaint**

22 On or about February 6, 2012, Brimer, who was and is acting in the interest of the  
23 general public in California, filed a complaint (“Complaint” or “Action”) in the Superior Court  
24 in and for the County of Marin against NECA and Does 1 through 150, alleging, *inter alia*,  
25 violations of Proposition 65 based on the alleged exposures to lead contained in the Noticed  
26 Lead Products. On or about February 10, 2012, Brimer filed a first amended complaint (“First  
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1 Amended Complaint”) in the Superior Court in and for the County of Marin against NECA and  
2 Does 1 through 150, alleging, *inter alia*, violations of Proposition 65 based on the alleged  
3 exposures to lead contained in the Noticed Lead Products. In the event that no public enforcer  
4 undertakes diligent prosecution of the allegations set forth in the Supplemental Notice, and upon  
5 entry of this Consent Judgment by the Court, the First Amended Complaint shall be deemed  
6 amended to include violations of Proposition 65 based on the alleged exposures to DEHP  
7 contained in the Noticed DEHP Products.

8 **1.8 No Admission**

9 NECA denies the material factual and legal allegations contained in Brimer's Notices  
10 and Complaints and maintains that all Products sold and distributed in California have been and  
11 are in compliance with all laws. Nothing in this Consent Judgment shall be construed as an  
12 admission by NECA of any fact, finding, issue of law, or violation of law; nor shall compliance  
13 with this Consent Judgment constitute or be construed as an admission by NECA of any fact,  
14 finding, conclusion, issue of law, or violation of law, such being specifically denied by NECA.  
15 However, this section shall not diminish or otherwise affect NECA’s obligations,  
16 responsibilities, and duties under this Consent Judgment.

17 **1.9 Consent to Jurisdiction**

18 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
19 jurisdiction over NECA as to the allegations contained in the Complaints, that venue is proper  
20 in the County of Marin, and that this Court has jurisdiction to enter and enforce the provisions  
21 of this Consent Judgment.

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date  
24 this Consent Judgment is approved by the Court.  
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1 **2. INJUNCTIVE RELIEF: REFORMULATION**

2 **2.1 Reformulated Products**

3 Commencing on the Effective Date and continuing thereafter, NECA shall only ship,  
4 sell, or offer to ship for sale in California Reformulated Products. For purposes of this Consent  
5 Judgment, Reformulated Products are Noticed Lead Products that comply with the Lead  
6 Reformulation Standards set forth in Section 2.2 and Noticed DEHP Products that comply with  
7 the DEHP Reformulation Standards set forth in Section 2.3.

8 **2.2 Lead Reformulation Standards**

9 Reformulated Products shall meet or exceed the standards outlined in Sections 2.2.1,  
10 2.2.2 or 2.2.3, subject to the following qualifications:

11 If the Noticed Lead Product contains Exterior Decorations in the Lip and Rim Area (as  
12 used throughout this Consent Judgment, the Lip and Rim Area shall include the exterior upper  
13 20 millimeters of a Product) or on any interior surface, it must also satisfy Section 2.2.4 to be  
14 considered a Reformulated Product.

15 **2.2.1 Wipe Test-Based Standard**

16 Reformulated Products shall yield a maximum result of 1.0 microgram (“ug”) residual  
17 lead content by weight on any surface, exclusive of the Lip and Rim Area or interior surface,  
18 with Exterior Decorations sampled pursuant to the NIOSH 9100 sampling protocol and  
19 analyzed pursuant to EPA Analytical Methods 3050B and/or 6020A(ICP/MS).

20 **2.2.2 Content-Based Standard**

21 Exterior Decorations, exclusive of the Lip and Rim Area, must only utilize materials that  
22 contain a maximum of 100 parts per million (“ppm”) (0.01%) lead by weight as measured either  
23 before or after the material is fired onto (or otherwise affixed to) the Noticed Lead Product,  
24 using EPA Test Method 3050B.<sup>1</sup>

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27 <sup>1</sup> If the Exterior Decoration is tested after it is affixed to a Product, the percentage of lead by weight must relate only  
28 to the decorating material and must not include any quantity attributable to any non-decorating material (e.g. the ceramicware substrate).

1                                   **2.2.3      Total Acetic-Acid Immersion Test-Based Standard**

2           The Reformulated Product achieves a result of 0.99 ppm (.0099%) or less lead after  
3   correcting for internal volume, when tested pursuant to American Society of Testing and  
4   Materials (“ASTM”) Standard Test C927-99 test method, modified for total immersion with  
5   results corrected for internal volume.

6                                   **2.2.4      Lip and Rim Area and Interior Surface Exterior Decoration**

7           If a Noticed Lead Product contains Exterior Decorations in the Lip and Rim Area:

8                                   (a)      any such Exterior Decorations must only utilize decorating  
9   materials that yield a result of no detectable lead when analyzed according to any test  
10  methodology authorized under Proposition 65; or

11                                  (b)      the Noticed Lead Product must yield a maximum lead  
12  concentration of one-half microgram per milliliter (0.5 µ/ml.) when tested according to ASTM  
13  Test Method C927-80 (2009).

14                                  **2.3      DEHP Reformulation Standards**

15           Reformulated Products shall mean that Accessible Components of Noticed DEHP  
16  Products do not contain DEHP in concentrations exceeding 1,000 ppm (0.1%) when analyzed  
17  pursuant to EPA testing methodologies 3580A and 8270C, or any other methodology utilized by  
18  federal or state agencies for the purpose of determining DEHP content in a solid substance.  
19  “Accessible Components,” as used in this Consent Judgment, shall mean components of a  
20  Noticed DEHP Product that can be handled, touched or mouthed by a consumer during normal  
21  and foreseeable use of the Noticed DEHP Product.

22                                  **2.4      Laboratory Requirement**

23           For the purposes of this Consent Judgment, any analysis of Products, including but not  
24  limited to sample collections, testing and analysis shall be conducted at laboratories that are  
25  accredited through the California Environmental Laboratory Accreditation Program (ELAP). In  
26  the event that a laboratory report identifies a Product that contains lead or DEHP in excess of  
27  the above referenced reformulation standards, such identified exceedances shall not be  
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1 considered a breach of this Consent Judgment if the sampling, testing and analysis of said  
2 Product was not conducted by a laboratory accredited by ELAP.

3 **3. MONETARY PAYMENTS**

4 **3.1 Civil Penalty Payments Pursuant to Health & Safety Code § 25249.7(b)**

5 Pursuant to Health & Safety Code § 25249.7(b), NECA shall pay \$20,000 in civil  
6 penalties. NECA shall pay an initial civil penalty of \$7,000 and a final civil penalty of \$13,000  
7 on the dates provided in Section 3.3. However, the final civil penalty shall be waived in its  
8 entirety if an officer of NECA provides Brimer with a written certification that, as of January 1,  
9 2013, and continuing on into the future, NECA has sold and will continue to sell only  
10 Reformulated Products as defined by Section 2.1 of this Consent Judgment. Brimer must receive  
11 any such certification no later than March 15, 2013, and time is of the essence.

12 The penalty payments will be allocated according to Health & Safety Code §§  
13 25249.12 (c)(1) & (d), with seventy-five percent (75%) of the penalty amount earmarked for  
14 the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the  
15 remaining twenty-five (25%) of the penalty amount earmarked for Brimer.

16 **3.2 Reimbursement of Plaintiff’s Fees and Costs**

17 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute  
18 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby  
19 leaving this fee issue to be resolved after the material terms of the agreement had been settled.  
20 NECA then expressed a desire to resolve the fee and cost issue shortly after the other settlement  
21 terms had been finalized. The Parties then attempted to (and did) reach an accord on the  
22 compensation due to Brimer and his counsel under general contract principles and the private  
23 attorney general doctrine codified at California Code of Civil Procedure §1021.5, for all work  
24 performed in this matter, except fees that may be incurred on appeal. Under these legal  
25 principles, NECA shall pay the amount of \$45,000 for fees and costs incurred investigating,  
26 litigating and enforcing this matter, including the fees and costs incurred (and yet to be  
27 incurred) negotiating, drafting, and obtaining the Court’s approval of this Consent Judgment  
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1 in the public interest.

2 **3.3 Payment Procedures**

3 **3.3.1 Funds Held In Trust.** The initial civil penalty payments required by  
4 Sections 3.1 and the payment required by Section 3.2 shall be delivered on or before the  
5 Effective Date to either The Chanler Group or the attorney of record for NECA and shall be held  
6 in trust pending the Court’s approval of this Consent Judgment.

7 Payments delivered to The Chanler Group shall be made payable, as follows:

- 8 (a) One check made payable to “The Chanler Group in Trust for  
9 OEHHA” in the amount of \$5,250;
- 10 (b) One check made payable to “The Chanler Group in Trust for  
11 Russell Brimer” in the amount of \$1,750; and
- 12 (c) One check made payable to “The Chanler Group in Trust” in the  
13 amount of \$45,000.

14 Payments delivered to Castellón & Funderburk LLP shall be made payable, as follows:

- 15 (a) One check made payable to “Castellón & Funderburk LLP in Trust  
16 for OEHHA” in the amount of \$5,250;
- 17 (b) One check made payable to “Castellón & Funderburk LLP in Trust  
18 for Russell Brimer” in the amount of \$1,750; and
- 19 (c) One check made payable to “Castellón & Funderburk LLP in Trust  
20 for The Chanler Group” in the amount of \$45,000.

21 If NECA elects to deliver payments to its attorney of record, such attorney of record  
22 shall: (a) confirm in writing within five days of receipt that the funds have been deposited in a  
23 trust account; and (b) within two days of the date of the hearing on which the Court approves the  
24 Consent Judgment, deliver the payment to The Chanler Group in three separate checks, as  
25 follows:

- 26 (a) One check made payable to “The Chanler Group in Trust for  
27 OEHHA” in the amount of \$5,250;

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- (b) One check made payable to “The Chanler Group in Trust for Russell Brimer” in the amount of \$1,750; and
- (c) One check made payable to “The Chanler Group” in the amount of \$45,000.

**3.3.2 Final Civil Penalty.** If the final civil penalty of \$13,000 referenced in Section 3.1 above is not waived, payments shall be delivered on or before March 29, 2013, to The Chanler Group and made payable, as follows:

- (a) One check made payable to “The Chanler Group in Trust for OEHHA” in the amount of \$9,750;
- (b) One check made payable to “The Chanler Group in Trust for Russell Brimer” in the amount of \$3,250.

**3.3.3 Issuance of 1099 Forms.** After the Consent Judgment has been approved and the settlement funds have been transmitted to Plaintiff’s counsel, NECA shall issue separate 1099 forms, as follows:

- (a) The first 1099 shall be issued to the Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of \$5,250;
- (b) The second 1099 shall be issued to Russell Brimer in the amount of \$1,750, whose address and tax identification number shall be furnished upon request;
- (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-3171522) in the amount of \$45,000;
- (d) If the penalty of \$13,000 referenced in Section 3.1 above is paid, the fourth 1099 shall be issued to the Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of \$9,750; and

1 (e) If the penalty of \$13,000 referenced in Section 3.1 above is paid,  
2 the fifth 1099 shall be issued to Brimer in the amount of \$3,250,  
3 whose address and tax identification number shall be furnished  
4 upon request.

5 **3.3.4 Payment Address.** All payments to the Chanler Group shall be delivered  
6 to the following payment address:

7 The Chanler Group  
8 Attn: Proposition 65 Controller  
9 2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710

10 **4. CLAIMS COVERED AND RELEASED**

11 **4.1 Brimer's Public Release of Proposition 65 Claims**

12 Brimer acting on his own behalf and in the public interest releases NECA from all claims  
13 for violations of Proposition 65 up through the Effective Date based on exposure to lead from the  
14 Noticed Lead Products as set forth in the Initial Notice. Compliance with the terms of this  
15 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to lead  
16 from the Noticed Lead Products as set forth in the Initial Notice.

17 In the event that the First Amended Complaint is deemed amended pursuant to Section 1.7  
18 above to include the allegations found in the Supplemental Notice, Brimer, acting on his own  
19 behalf and in the public interest, further releases NECA from all claims for violations of  
20 Proposition 65 up through the Effective Date based on exposure to DEHP in the Noticed DEHP  
21 Products as set forth in the Supplemental Notice. Compliance with the terms of this Consent  
22 Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP from the  
23 Noticed DEHP Products as set forth in the Supplemental Notice.

24 **4.2 Brimer's Individual Release of Claims**

25 Brimer also, in his individual capacity only and *not* in his representative capacity, provides  
26 a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all  
27 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,  
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1 liabilities and demands of Plaintiff of any nature, character or kind, whether known or unknown,  
2 suspected or unsuspected, limited to and arising out of alleged or actual exposures to lead and/or  
3 DEHP in the Products manufactured, imported, distributed, sold and/or offered for sale by NECA.

4 **4.3 NECA's Release of Plaintiff**

5 NECA on behalf of itself, its past and current agents, representatives, attorneys,  
6 successors, and/or assignees, hereby waives any and all claims against Brimer, his attorneys and  
7 other representatives, for any and all actions taken or statements made (or those that could have  
8 been taken or made) by Brimer and his attorneys and other representatives, whether in the  
9 course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this  
10 matter with respect to the Products.

11 **5. COURT APPROVAL**

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

17 **6. SEVERABILITY**

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

21 **7. GOVERNING LAW**

22 The terms of this Consent Judgment shall be governed by the laws of the State of  
23 California and apply within the State of California. In the event that Proposition 65 is repealed  
24 or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then  
25 NECA shall provide written notice to Brimer of any asserted change in the law, and shall have  
26 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,  
27 the Products are so affected.

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1 **8. NOTICES**

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

6 To NECA:

7 William W. Funderburk, Jr.  
8 Alastair Hamblin  
9 Castellón & Funderburk, LLP  
811 Wilshire Boulevard, Suite 1025  
Los Angeles, California 90017

To Brimer:

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

10 With a copy to:

11 Joel Weinshanker, President  
12 National Entertainment Collectibles Association, Inc.  
13 603 Sweetland Avenue  
Hillside, NJ 07205

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

16 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

17 This Consent Judgment may be executed in counterparts and by facsimile or portable  
18 document format (".pdf"), each of which shall be deemed an original, and all of which, when  
19 taken together, shall constitute one and the same document. A facsimile or .pdf signature shall  
20 be as valid as the original.

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

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

24 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

25 The Parties agree to mutually employ their, and their counsel's, reasonable best efforts to  
26 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent  
27 Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to  
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1 California Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial  
2 approval of this Consent Judgment, which Brimer shall file, and which NECA shall not oppose.  
3 If any third party objection to the noticed motion is filed, Brimer and NECA shall work together  
4 to file a joint reply and appear at any hearing before the Court. If the Superior Court does not  
5 approve the motion to approve this Consent Judgment, and the Parties choose not to pursue a  
6 modified Consent Judgment within 30 days of said denial, or in the event that the Superior  
7 Court approve this Consent Judgment and any person successfully appeals that approval, all  
8 payments made pursuant to this Consent Judgment will be returned to NECA.

9 **12. MODIFICATION**

10 This Consent Judgment may be modified only: (1) by written agreement of the parties  
11 and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful  
12 motion of any Party and entry of a modified Consent Judgment by the court.

13 **13. ENTIRE AGREEMENT**

14 This Consent Judgment contains the sole and entire agreement and understanding of the  
15 Parties with respect to the entire subject matter hereof, and any and all prior discussions,  
16 negotiations, commitments, and understandings related hereto. No representations, oral or  
17 otherwise, express or implied, other than those contained herein have been made by any party  
18 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be  
19 deemed to exist or to bind any of the Parties.

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**14. AUTHORIZATION**

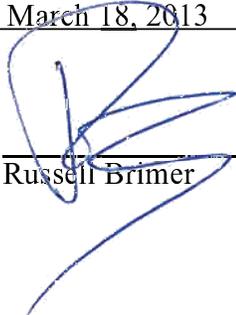
The undersigned are authorized to execute this Consent Judgment on behalf of their respective parties and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

**AGREED TO:**

**AGREED TO:**

Date: March 18, 2013

Date: \_\_\_\_\_

By:  \_\_\_\_\_  
Russell Brimer

By: \_\_\_\_\_  
Alexis Muller, Director of Business &  
Legal Affairs  
National Entertainment Collectibles  
Association, Inc.

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**14. 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.

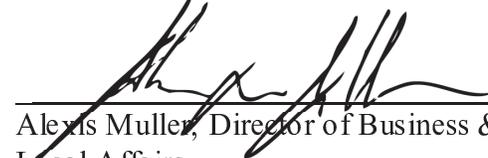
**AGREED TO:**

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Date: \_\_\_\_\_

Date: March 12, 2013

By: \_\_\_\_\_  
Russell Brimer

By:   
Alexis Muller, Director of Business &  
Legal Affairs  
National Entertainment Collectibles  
Association, Inc.