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11 Attorneys for Defendants  
AMERICA WEST AIRLINES, INC.;;  
12 AMERICA WEST COMPANY STORE, LLC

13  
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
15 FOR THE COUNTY OF ALAMEDA  
16 UNLIMITED CIVIL JURISDICTION  
17

18 RUSSELL BRIMER

19 Plaintiff,

20 v.

21 AMERICA WEST AIRLINES, INC.;;  
AMERICA WEST COMPANY STORE,  
22 LLC; and DOES 1 through 150, inclusive,

23 Defendants.

Case No. HG06264908

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

1     **1. INTRODUCTION**

2             **1.1 Russell Brimer And Defendants**

3             This Consent Judgment is entered into by and between plaintiff Russell Brimer (hereinafter  
4 "Brimer" or "Plaintiff") and defendants America West Airlines, Inc., and America West Company  
5 Store, LLC, (hereafter referred to in the singular as "America West" or "Defendant"), with Brimer  
6 and America West collectively referred to as the "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            America West employs ten or more persons and is a person in the course of doing business  
13 for purposes of Proposition 65.

14            **1.4 General Allegations**

15            Brimer alleges that America West has manufactured, distributed and/or sold in the State of  
16 California certain mugs and other ceramic containers intended for the use of food or beverages  
17 with colored artwork or designs (containing lead) on the exterior. 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 the "Listed Chemical."

21            **1.5 Product Description**

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

28     ///

1           **1.6    Notices of Violation**

2           On or about January 9, 2006, Brimer served America West and various public enforcement  
3 agencies with a document entitled "60-Day Notice of Violation" (the "Notice") that provided  
4 America West and such public enforcers with notice that alleged that America West was in  
5 violation of California Health & Safety Code §25249.6 for failing to warn consumers and  
6 customers that the Products that America West sold exposed users in California to the Listed  
7 Chemical.

8           **1.7    Complaint**

9           On April 13, 2006, Brimer, who is acting in the interest of the general public in California,  
10 filed a complaint (hereafter referred to as the "Complaint" or the "Action") in the Superior Court  
11 in and for the County of Alameda against America West Airlines, Inc., and America West  
12 Company Store, LLC and Does 1 through 150, (*Brimer v. America West Airlines, Inc.*; *America*  
13 *West Company Store, LLC*; *and Does 1 through 150*, Alameda Superior Court Case No.  
14 HG06264908) alleging violations of Health & Safety Code §25249.6 based on the alleged  
15 exposures to the Listed Chemical contained in the Products sold by America West.

16           **1.8    No Admission**

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

26           **1.9    Consent to Jurisdiction**

27           For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
28 jurisdiction over America West as to the allegations contained in the Complaint, that venue is

1 proper in the County of Alameda and that this Court has jurisdiction to enter and enforce the  
2 provisions of this Consent Judgment.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term "Effective Date" shall mean April 1,  
5 2007.

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

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

11 Any warning issued for Products pursuant to this Section 2.2 below shall be prominently  
12 placed with such conspicuousness as compared with other words, statements, designs, or devices  
13 as to render it likely to be read and understood by an ordinary individual under customary  
14 conditions before purchase or, for Products shipped directly to an individual in California, before  
15 use. Any warning issued pursuant to Section 2.2 shall be provided in a manner such that the  
16 consumer or user understands to which *specific* product the warning applies, so as to minimize if  
17 not eliminate the chance of an overwarning situation.

18 **2.2 Product Warnings**

19 **2.2.1** Clear and Reasonable Warnings. This Section describes America West's  
20 options for satisfying the warning obligations required by Section 2.1, depending, in part, on the  
21 manner of sale:

22 **(a) Retail Store Sales**

23 **(i) Product Labeling.** From the Effective Date, a warning will  
24 be affixed to the packaging, labeling or directly on the Product by America West or its agent, that  
25 states:

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

1 (ii) **Point-of-Sale Warnings.** America West may perform its  
2 warning obligations by insuring to the greatest extent possible that signs are posted at retail outlets  
3 in the State of California where the Products are sold. America West must receive a written  
4 commitment from each retailer to whom America West sells Products directly that it will post the  
5 warning signs. Point-of-sale warnings shall be provided through one or more signs posted in close  
6 proximity to the point of display of the Products that state:

7 **WARNING:** The materials used as colored decorations on  
8 the exterior of this product contain lead, a  
9 chemical known to the State of California to  
10 cause birth defects and other reproductive  
11 harm.

12 (b) **Mail Order Catalog and Internet Sales.** Defendant shall satisfy  
13 its warning obligations for Products that are sold by mail order catalog or from the internet to  
14 California residents, by providing a warning: (a) in the mail order catalog and/or on the website;  
15 or (b) with the Product when it is shipped to an address in California. Warnings given in the mail  
16 order catalog or on the website shall identify the specific Product to which the warning applies as  
17 further specified in Sections 2.2.1(b)(i), (ii) and/or (iii) as applicable:

18 (i) **Mail Order Catalog.** Any warning provided in a mail order  
19 catalog must be in the same type size or larger as the product description text within the catalog.  
20 The following warning shall be provided on the same page and in the same location as the display  
21 and/or description of the Product:

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

27 Where it is impracticable to provide the warning on the same page and in the same location  
28 as the display and/or description of the Product, America West may utilize a designated symbol to  
cross reference the applicable warning ("Designated Symbol" or "▼") and shall define the term  
Designated Symbol with the following language on the inside of the front cover of the catalog or  
on the same page as any order form for the Product(s):

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**WARNING:** The materials used as colored decorations on the exterior of certain products identified with this symbol ▼ and offered for sale in this catalog contain lead, a chemical known to the State of California to cause birth defects and other reproductive harm.

The Designated Symbol (shown on Exhibit A attached hereto) must appear on the same page and in close proximity to the display and/or description of the Product. On each page where the Designated Symbol appears, America West must provide a header or footer directing the consumer to the warning language and definition of the Designated Symbol.

If Defendant elects to provide warnings in the mail order catalog, then the warnings must be included in all catalogs offering to sell one or more Products printed after March 30, 2007.

**(ii) Internet Web Sites and Pages.** 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 as 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 and other reproductive harm.

Alternatively, the Designated Symbol may appear adjacent to or immediately following the 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:

**WARNING:** Products identified on this page with the following symbol use materials that contain lead as colored decorations on their exterior, a chemical known to the State of California to cause birth defects and other reproductive harm: ▼

1 (iii) **Package Insert or Label.** For all Products sold by catalog  
2 or via the internet, a warning may be provided with the Product when it is shipped directly to an  
3 individual in California, by either: (a) affixing the following warning language to the packaging,  
4 labeling or directly to a specific Product; (b) inserting a warning card measuring at least 4" x 6" in  
5 the shipping carton which contains the following warning language; or (c) by placing the  
6 following warning statement on the packing slip or customer invoice on the line directly below the  
7 description of the Product on the packing slip or customer invoice:

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

11 Alternatively, America West may place the following language on the packing slip or  
12 invoice and specifically identifying the Product in lettering of the same size or larger as the  
13 description of the Product:

14 **WARNING:** The materials used as colored decorations on the exterior  
15 of the following product(s) contain lead, a chemical known  
to the State of California to cause birth defects or other  
reproductive harm:

16 *[list products for which warning is given].*

17 The Defendant shall, in any of these instances, in conjunction with providing the warning,  
18 also inform the consumer, in a conspicuous manner, that he or she may return the Product for a  
19 full refund (including shipping costs for both the receipt and the return of the Product) within  
20 thirty (30) days of his or her receipt of the Product.

### 21 **2.2.2 Exceptions**

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

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

### 25 **2.3 Reformulation Standards**

26 The following Products shall be deemed "Reformulated Products" and to comply with  
27 Proposition 65 and be exempt from any Proposition 65 warning requirements under Sections 2.2:

- 28 (a) Products that only utilize decorating materials that contain six one-hundredths of one

1 percent (0.06%) or less of lead by weight, and that contain no detectable lead in the lip-and-rim  
2 area;

3 (b) Products that produce a test result no higher than 1.0 micrograms of lead on decorated  
4 portions pursuant to NIOSH method 9100, in appropriate periodic testing, and that contain no  
5 detectable lead in the lip-and-rim area; or

6 (c) Products that achieve a result of 0.99 ppm or less for lead after correction for internal  
7 volume when tested pursuant to ASTM C927-99, in appropriate periodic testing, when modified  
8 for total immersion with results corrected for internal volume, and that contain no detectable lead  
9 in the lip-and-rim area.

10 "Lip-and-rim area" is defined as the exterior top 20 millimeters of a product intended for  
11 beverages, as defined by ASTM method C927-99.

12 "No detectable lead" means that no lead is detected at a level above two one-hundredths of  
13 one percent (0.02%) by weight, using a sample size of the materials in question measuring  
14 approximately 50-100 mg and a test method of sufficient sensitivity to establish a limit of  
15 quantitation of less than 200 ppm.

#### 16 **2.4 Reformulation Commitment**

17 America West hereby commits that all Products that it offers for sale in California after  
18 June 1, 2007, shall qualify as Reformulated Products.

### 19 **3. MONETARY PAYMENTS**

#### 20 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

21 The total settlement amount shall be \$1,000.00, which shall be paid by America West as  
22 set forth herein. Pursuant to Health & Safety Code §25249.7(b), America West shall pay  
23 \$1,000.00 in civil penalties on or before April 15, 2007. Said payments shall be made payable to  
24 the "HIRST & CHANLER LLP in Trust For Russell Brimer" and shall be delivered to plaintiff's  
25 counsel at the following address:

26 HIRST & CHANLER LLP  
27 Attn: Proposition 65 Controller  
28 2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565



1           **3.2    Apportionment of Penalties Received**

2           All penalty monies received shall be apportioned by Brimer in accordance with Health &  
3    Safety Code §25192, with 75% of these funds remitted by Brimer to the State of California's  
4    Office of Environmental Health Hazard Assessment and the remaining 25% of these penalty  
5    monies retained by Brimer as provided by Health & Safety Code §25249.12(d). Brimer shall bear  
6    all responsibility for apportioning and paying to the State of California the appropriate civil  
7    penalties paid in accordance with this Section.

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

9           The Parties acknowledge that Brimer and his counsel offered to resolve this dispute  
10   without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving  
11   this fee issue to be resolved after the material terms of the agreement had been settled. America  
12   West then expressed a desire to resolve the fee and cost issue shortly after the other settlement  
13   terms had been finalized. The Parties then attempted to (and did) reach an accord on the  
14   compensation due to Brimer and his counsel under the private attorney general doctrine codified at  
15   California Code of Civil Procedure §1021.5 for all work performed through the Court's approval  
16   of this agreement. Under the private attorney general doctrine, America West shall reimburse  
17   Brimer and his counsel for fees and costs incurred as a result of investigating, bringing this matter  
18   to America West's attention, litigating and negotiating a settlement in the public interest and  
19   seeking the Court's approval of the settlement agreement. America West shall pay Brimer and his  
20   counsel \$15,000.00 for all attorneys' fees, expert and investigation fees, litigation and related  
21   costs. The payment shall be made payable to HIRST & CHANLER LLP and shall be delivered on  
22   or before April 15, 2007, at the following address:

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

28           **5.       RELEASE OF ALL CLAIMS**

**5.1    Release of America West and Downstream Customers**

          In further consideration of the promises and agreements herein contained, and for the

1 payments to be made pursuant to Sections 3 and 4, Brimer, on behalf of himself, his past and  
2 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the  
3 general public, hereby waives all rights to institute or participate in, directly or indirectly, any  
4 form of legal action and releases all claims, including, without limitation, all actions, and causes  
5 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,  
6 penalties, losses or expenses (including, but not limited to, investigation fees, expert fees and  
7 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent  
8 (collectively "Claims"), against America West and each of its parent companies, corporate  
9 affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,  
10 shareholders, agents, and employees, and sister and parent entities, downstream distributors,  
11 wholesalers, licensors, licensees, auctioneers, retailers, franchisees, dealers, customers, owners,  
12 purchasers, and users, (collectively "Releasees"). This release is limited to those claims that arise  
13 under Proposition 65, as such claims relate to America West's alleged failure to warn about  
14 exposures to or identification of the Listed Chemical contained in the Products.

15 The Parties further understand and agree that this release shall not extend upstream to any  
16 entities that manufactured the Products or any component parts thereof, or any distributors or  
17 suppliers (other than parent companies, corporate affiliates, and subsidiaries) who sold the  
18 Products or any component parts thereof to America West.

19 **5.2 America West's Release of Brimer**

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

25 **6. COURT APPROVAL**

26 This Consent Judgment is not effective until it is approved and entered by the Court and  
27 shall be null and void if, for any reason, it is not approved and entered by the Court within one  
28 year after it has been fully executed by all Parties, in which event any monies that have been

1 provided to Plaintiff, or his counsel pursuant to Section 3 and/or Section 4 above, shall be  
2 refunded within fifteen (15) days after receiving written notice from America West that the  
3 one-year period has expired.

4 **7. SEVERABILITY**

5 If, subsequent to court approval of this Consent Judgment, any of the provisions of this  
6 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable  
7 provisions remaining shall not be adversely affected.

8 **8. ATTORNEYS' FEES**

9 In the event that, after Court approval: (1) America West or any third party seeks  
10 modification of this Consent Judgment pursuant to Section 14 below; or (2) Brimer takes  
11 reasonable and necessary steps to enforce a breach of the terms of this Consent Judgment, Brimer  
12 shall be entitled to seek reasonable attorneys' fees and costs pursuant to CCP §1021.5.

13 **9. GOVERNING LAW**

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

20 **10. NOTICES**

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

25 To America West:

26 Michael Minerva  
27 America West Airlines, Inc., and America West Company Store, LLC  
111 W. Rio Salado Parkway  
28 Tempe, AZ 85281

1 To Brimer:

2 Proposition 65 Coordinator  
3 HIRST & CHANLER LLP  
4 2560 Ninth Street  
5 Parker Plaza, Suite 214  
6 Berkeley, CA 94710-2565

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

9 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

10 This Consent Judgment may be executed in counterparts and by facsimile, each of which  
11 shall be deemed an original, and all of which, when taken together, shall constitute one and the  
12 same document.

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

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

16 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

17 Brimer and America West agree to mutually employ their best efforts to support the entry  
18 of this Agreement as a Consent Judgment and obtain approval of the Consent Judgment by the  
19 Court in a timely manner. The Parties acknowledge that, pursuant to Health & Safety Code §  
20 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment.  
21 Accordingly, the Plaintiff agrees to file a Motion to Approve the Agreement ("Motion"). America  
22 West shall have no additional responsibility to Plaintiff's counsel pursuant to Code of Civil  
23 Procedure §1021.5 or otherwise with regard to reimbursement of any fees and costs incurred with  
24 respect to the preparation and filing of the Motion or with regard to Plaintiff's counsel appearing  
25 for a hearing thereon.

26 **14. MODIFICATION**

27 This Consent Judgment may be modified only: (1) by written agreement of the Parties and  
28 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion  
of any Party and entry of a modified Consent Judgment by the Court. The Attorney General shall

1 be served with notice of any proposed modification to this Consent Judgment at least fifteen (15)  
2 days in advance of its consideration by the Court.  
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**15. 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.

<p style="text-align: center;"><b>AGREED TO:</b></p> <p>Date: <u>4-30-07</u></p> <p>By: <u></u> Plaintiff, Russell Brimer</p>	<p style="text-align: center;"><b>AGREED TO:</b></p> <p>Date: <u>March 22, 2007</u></p> <p>By: <u></u> Defendants, America West Airlines, Inc.; America West Company Store, LLC</p>
<p style="text-align: center;"><b>APPROVED AS TO FORM:</b></p> <p>Date: <u>April 25, 2007</u></p> <p>HIRST &amp; CHANLER LLP</p> <p>By: <u></u> Keith G. Adams Attorneys for Plaintiff RUSSELL BRIMER</p>	<p style="text-align: center;"><b>APPROVED AS TO FORM:</b></p> <p>Date: <u>April 20, 2007</u></p> <p>SONNENSCHN NATH &amp; ROSENTHAL LLP</p> <p>By: <u></u> Sarah J. Ratcliffe Attorneys for Defendant AMERICA WEST AIRLINES, INC.; AMERICA WEST COMPANY STORE, LLC</p>

**IT IS SO ORDERED.**

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

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JUDGE OF THE SUPERIOR COURT

EXHIBIT A

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**Exhibit A**

1. *Mug AWA Classic (Airbus Mug) #562*



EXHIBIT B

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**Exhibit B**

The Designated Symbol that America West will use to identify Products containing the Listed Chemical which are sold through its catalogs or on its website is:

