

1 Stephen S. Sayad, State Bar No. 104866
2 Laurence D. Haveson, State Bar No. 152631
3 THE CHANLER GROUP
4 81 Throckmorton, Suite 203
5 Mill Valley, CA 94941
6 Telephone: (415) 388-1128
7 Facsimile: (415) 388-1135

8 Attorneys for Plaintiff
9 RUSSELL BRIMER

FILED

MAY 25 2011

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: A. Garcia, Deputy

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF MARIN

12 RUSSELL BRIMER,

13 Plaintiff,

14 vs.

15 ATICO INTERNATIONAL USA, INC.;
16 WALGREEN CO; and DOES 1 through 150,
17 inclusive,

18 Defendants

19 RUSSELL BRIMER,

20 Plaintiff,

21 vs.

22 CVS PHARMACY, INC.; CVS CAREMARK
23 CORPORATION and DOES 1 through 150,
24 inclusive,

25 Defendants.

Case No. CIV 093189; and
Case No. CIV 1004055 (to be consolidated)

**[PROPOSED] JUDGMENT PURSUANT TO
TERMS OF PROPOSITION 65
SETTLEMENT AND [PROPOSED]
CONSENT JUDGMENT**

Date: May 25, 2011
Time: 8:30 A.M.
Dept.: B
Judge: Hon. Roy O. Chernus

Lead case filed: June 25, 2009
Trial Date: March 22, 2011

1 In the above-entitled action, Plaintiff RUSSELL BRIMER and Defendant ATICO
2 INTERNATIONAL USA, INC., having agreed through their respective counsel that Judgment be
3 entered pursuant to the terms of the Proposition 65 settlement agreement in the form of a Consent
4 Judgment, and following issuance of an Order approving this Proposition 65 settlement agreement
5 and entering the Consent Judgment,

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Health & Safety
7 Code § 25249.7(f)(4) and Code of Civil Procedure § 664.6, Judgment is entered in accordance with
8 the terms of the Consent Judgment attached hereto as **Exhibit 1**. By stipulation of the parties, the
9 Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure § 664.6.

10 **IT IS SO ORDERED.**

11 Dated: MAY 25 2011

ROY CHERNUS

JUDGE OF THE SUPERIOR COURT

Exhibit 1

1 Stephen S. Sayad, State Bar No. 104866
THE CHANLER GROUP
2 2560 Ninth Street, Suite 214
Berkeley, CA 94710-2565
3 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

4 Attorneys for Plaintiff
5 RUSSELL BRIMER

6 Renee D. Wasserman, State Bar No. 108118
ROGERS JOSEPH O'DONNELL, a Professional Law Corporation
7 311 California Street, 10th floor
San Francisco, CA 94104
8 Telephone: (415) 956-2828
Facsimile: (415) 956-6457

9 Attorneys for Defendants
10 CVS PHARMACY, INC., CVS CAREMARK CORPORATION,
WALGREEN CO., and ATICO INTERNATIONAL USA, INC.
11

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF MARIN
14 UNLIMITED CIVIL JURISDICTION

15 RUSSELL BRIMER,
16
17 Plaintiff,

18 v.

19 CVS PHARMACY, INC.; CVS CAREMARK
CORPORATION; and DOES 1 through 150,
inclusive,

20 Defendants

21
22 RUSSELL BRIMER,
23 Plaintiff,

24 v.

25 ATICO INTERNATIONAL USA, INC.;
WALGREEN CO. AND DOES 1-150,
inclusive,

26 Defendants.
27
28

Case No. CIV 1004055; and
Case No. CIV 093189 (*consolidated herein*)

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

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

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Stipulation and [Proposed] Order Re: Consent Judgment (hereinafter “Consent
4 Judgment”) is entered into by and between Russell Brimer (hereinafter “Brimer”) and Atico
5 International USA, Inc. (hereinafter “Atico”) only, with Brimer and Atico collectively referred to
6 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 Defendants**

12 Atico employs ten or more persons and is a person in the course of doing business for
13 purposes of Proposition 65. Walgreen Co. (hereinafter “Walgreen”), CVS Pharmacy Inc. and its
14 wholly owned subsidiary, Longs Drug Stores California, L.L.C, (hereinafter “CVS”) are retailers.
15 Atico caused to be manufactured and supplied certain color-coated metal fasteners that are alleged
16 to contain lead to CVS. Atico caused to be manufactured and supplied certain vinyl coated
17 measuring tapes that are alleged to contain lead to Walgreen. CVS Caremark Corporation is the
18 parent company of CVS Pharmacy and did not manufacture, supply or sell Atico products.

19 **1.4 General Allegations**

20 Brimer alleges that Atico manufactured, distributed, and/or sold in the State of California
21 vinyl-coated measuring tapes containing lead including, but not limited to, the *Living Solutions*
22 *Sewing Kit, Item 846278 (#0 49022 02667 4)* and color-coated metal fasteners containing lead
23 including, but not limited to, *126 PC Pins & Clips Combo Set, #690318 (#0 50428 14743 6)*.
24 Lead is listed pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California
25 Health & Safety Code §§ 25249.5, *et seq.* (“Proposition 65”), as a chemical known to the State of
26 California to cause birth defects and other reproductive harm. Lead is referred to herein as “Lead”
27 or the “Listed Chemical.”

1 **1.5 Product Description**

2 The products that are covered by this Consent Judgment are defined as vinyl-coated
3 measuring tapes which contain the Listed Chemical, including but not limited to, the *Living*
4 *Solutions Sewing Kit, Item 846278 (#0 49022 02667 4)* and color-coated metal fasteners which
5 contain the Listed Chemical, including, but not limited to, *126 PC Pins & Clips Combo Set,*
6 *#690318 (#0 50428 14743 6)* manufactured, distributed and/or sold in California by Atico and its
7 chain of distribution, including Walgreen and CVS. All such items shall be referred to herein as
8 the "Products."

9 **1.6 Notices of Violation**

10 On or about February 24, 2009, Brimer served Atico, Walgreen and various public
11 enforcement agencies with a 60-Day Notice alleging violations of Proposition 65 resulting from
12 the sale of vinyl-coated measuring tapes which contain the Listed Chemical without the requisite
13 warnings, including but not limited to, the *Living Solutions Sewing Kit, Item 846278 (#0 49022*
14 *02667 4)*, ("hereinafter the Walgreen Notice").

15 On or about December 15, 2009, Brimer served CVS Caremark Corporation, CVS
16 Pharmacy Inc., and various public enforcement agencies with a 60-Day Notice alleging violations
17 of Proposition 65 resulting from the sale of color-coated metal fasteners which contain the Listed
18 Chemical without the requisite warnings, including, but not limited to, *126 PC Pins & Clips*
19 *Combo Set, #690318 (#0 50428 14743 6)*, ("hereinafter the CVS Notice").

20 On or about December 31 2010, Brimer served Atico and various public enforcement
21 agencies with a 60-Day Notice alleging violations of Proposition 65 resulting from the sale of
22 color-coated metal fasteners which contain the Listed Chemical without the requisite warnings,
23 including, but not limited to, *126 PC Pins & Clips Combo Set, #690318 (#0 50428 14743 6)*,
24 ("hereinafter the Atico Notice").

25 **1.7 Complaint**

26 On June 25, 2009, Brimer, who was and is acting in the interest of the general public in
27 California, filed a complaint in the Superior Court for the County of Marin against Atico and
28 Walgreen and Does 1 through 150, alleging violations of Health & Safety Code § 25249.6 based

1 on the claims set forth in the Walgreen Notice, in the matter of *Brimer v Atico International USA,*
2 *Inc., et al.,* (Marin County Case No.CIV 093189).

3 On August 3, 2010, Brimer filed a complaint in the Superior Court for the County of
4 Marin against CVS Pharmacy Inc., CVS Caremark Corporation, and Does 1 through 150, alleging
5 violations of Health & Safety Code § 25249.6 based on the claims set forth in the CVS Notice, in
6 the matter of *Brimer v. CVS Pharmacy, Inc. et al,* (Marin County Case No. CIV 1004055).

7 Upon approval and entry of this Consent Judgment and the expiration of the Atico Notice,
8 the Complaint in the matter of *Brimer v. CVS Pharmacy, Inc. et al.* (Marin County Case No.
9 CIV 1004055) shall be deemed amended, *nunc pro tunc*, to name Atico as a defendant and to
10 allege that the Products sold by CVS were manufactured for and/or distributed by Atico.

11 Upon approval and entry of this Consent Judgment, Case Numbers CIV 093189 and
12 CIV 1004055 shall be deemed to have been consolidated by the Court for pre-trial purposes on its
13 own motion and any judgment entered based on the Consent Judgment shall be filed in both
14 actions, referred to herein as the “Actions” or the “Complaints”.

15 **1.8 No Admission**

16 Walgreen, CVS and Atico deny the material factual and legal allegations contained in
17 Brimer’s Notices and Complaints and maintain that all Products that they have distributed, sold or
18 offered for sale in California have been and are in compliance with all laws. Nothing in this
19 Consent Judgment shall be construed as an admission by Walgreen, CVS Caremark Corporation,
20 CVS or Atico of any fact, finding, issue of law, or violation of law, nor shall compliance with this
21 Consent Judgment constitute or be construed as an admission by Atico, of any fact, finding,
22 conclusion, issue of law or violation of law, such being specifically denied by Atico.

23 However, in order to avoid the uncertainty of litigation, Atico enters into this settlement
24 agreement with Brimer in exchange for: (1) a release for Products it sold to Walgreen and CVS;
25 (2) a downstream release for Walgreen and CVS for their sales of Atico Products; and (3) a
26 dismissal without prejudice of Walgreen from *Brimer v Atico International USA, Inc., et al,* (Case
27 No. CIV 093189) and a dismissal without prejudice of defendants CVS and CVS Caremark
28 Corporation from *Brimer v. CVS Pharmacy, Inc.et. al.,* (Case No. CIV 1004055).

1 This section shall not diminish or otherwise affect the obligations, responsibilities and
2 duties of Atico under this Consent Judgment.

3 **1.9 Consent to Jurisdiction**

4 For purposes of this Consent Judgment only, the parties stipulate that this Court has
5 jurisdiction over Atico as to the allegations contained in the Complaint, that venue is proper in the
6 County of Marin and that this Court has jurisdiction to enter and enforce the provisions of this
7 Consent Judgment.

8 **1.10 Effective Date**

9 For purposes of this Consent Judgment, the term "Effective Date" shall mean January 31,
10 2011.

11 **2. INJUNCTIVE RELIEF: REFORMULATION**

12 As of the Effective Date, Atico shall only distribute and/or sell, or cause to be distributed,
13 and/or sold, Products in California that contain less than or equal to 100 ppm of lead when
14 analyzed pursuant to Environmental Protection Agency ("EPA") testing methodologies 3050B or
15 equivalent methods.

16 **3. PAYMENTS PURSUANT TO HEALTH & SAFETY CODE § 25249.7(B)**

17 In settlement of all the claims referred to in this Consent Judgment against it, Atico shall
18 make payments and receive credits totaling \$40,000, in civil penalties, as follows:

19 **3.1** Atico shall make an initial payment of \$10,000 to be apportioned in accordance with
20 Health & Safety Code § 25249.12 (c)(1) and (d), with 75% of these funds remitted to the State of
21 California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining
22 25% of these penalty monies remitted to Brimer as provided by Health & Safety Code
23 § 25249.12(d). Atico shall issue two separate checks for the penalty payment: (a) one check
24 made payable to "The Chanler Group in Trust for OEHHA" in the amount of \$7,500, representing
25 75% of the total penalty, and (b) one check to "The Chanler Group in Trust for Russell Brimer" in
26 the amount of \$2,500, representing 25% of the total penalty. Two separate 1099s shall be issued
27 for the above payments. The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento,
28 CA 95814 (EIN: 68-0284486) in the amount of \$7,500. The second 1099 shall be issued to

1 Brimer in the amount of \$2,500, whose address and tax identification number shall be furnished,
2 upon request, at least five (5) calendar days before payment is due. The payments shall be
3 delivered on or before January 31, 2011, at the address set forth in Section 3.4.

4 3.2 Atico shall receive an automatic credit of \$30,000, for its commitment to reformulate
5 its Products pursuant to Section 2, above.

6 3.3 All payments, unless waived, shall be delivered to the following address:

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

10 **4. REIMBURSEMENT OF ATTORNEY'S FEES AND COSTS**

11 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
12 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
13 this fee issue to be resolved after the material terms of the agreement had been settled. After the
14 other settlement terms had been finalized, the Parties attempted to (and did) reach an accord on the
15 compensation due to Brimer and his counsel under the private attorney general doctrine codified
16 at Code of Civil Procedure § 1021.5 and principles of contract law. Under these legal principles,
17 Atico shall reimburse Brimer and his counsel for fees and costs incurred as a result of
18 investigating, bringing this matter to Atico's attention, litigating, negotiating a settlement in the
19 public interest and working to have any applicable Consent Judgment entered. Exclusive of fees
20 and costs that may be incurred in the event of an appeal, this amount includes anticipated future
21 fees and costs to seek judicial approval of this Consent Judgment in the trial court and completing
22 other necessary tasks after the execution of the Consent Judgment, such as, review of and
23 assistance to counsel for Defendants drafting and filing of the motion to approve papers and notice
24 of entry of judgment, fulfilling the reporting requirements referenced in Health & Safety Code
25 § 25249.7(f), responding to any third party objections, corresponding with opposing counsel and
26 appearing before the Court related to the approval process. Atico shall pay Brimer and his counsel
27 \$65,000 for all attorney's fees, expert and investigation fees, and related costs incurred as a result
28 of investigating, bringing these matters to Atico's attention, and litigating and negotiating a

1 settlement in the public interest. The payment shall be issued in a third separate check made
2 payable to "The Chanler Group" and shall be delivered on or before January 31, 2011 at the
3 following address:

4 The Chanler Group
5 Attn: Proposition 65 Controller
6 2560 Ninth Street, Suite 214
7 Berkeley, CA 94710

8 Atico shall issue a separate 1099 for fees and costs paid in the amount of \$65,000 to The
9 Chanler Group, 2560 Ninth Street, Suite 214, Berkeley, CA 94710-2565 (EIN: 94-3171522).

10 **5. RELEASE OF ALL CLAIMS**

11 **5.1 Release of Walgreen, CVS Caremark, CVS, Atico
12 and Downstream Customers**

13 In further consideration of the promises and agreements herein contained, and for the
14 payments to be made pursuant to Sections 3 and 4 above, Brimer, on behalf of himself, his past
15 and current agents, representatives, attorneys, successors and/or assignees, and in the interest of
16 the general public, hereby waives all rights to institute or participate in, directly or indirectly, any
17 form of legal action and releases all claims, including, without limitation, all actions, and causes
18 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
19 penalties, losses or expenses (including, but not limited to, investigation fees, expert fees and
20 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent
21 (collectively "Claims"), that were brought or could have been brought against Atico and each of
22 its downstream licensors, licensees, wholesalers, retailers, franchisees, dealers, customers, owners,
23 purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective officers,
24 directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent
25 entities, including specifically Walgreen, CVS Pharmacy, Inc., its wholly owned subsidiary,
26 Longs Drug Stores California, L.L.C., and CVS Caremark Corporation (collectively "Releasees").
27 This release is limited to those Claims that arise under Proposition 65, as such Claims relate to
28 Walgreen's, CVS' and Atico's alleged failure to warn about exposures to the Listed Chemical
contained in the Products.

1 In addition to the foregoing, Brimer, on behalf of himself, his past and current agents,
2 representatives, attorneys, and successors and/or assignees, and *not* in his representative capacity
3 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
4 and releases all Claims against Walgreen, CVS and Atico and each of its Releasees as such Claims
5 relate to Walgreen's, CVS' and Atico's alleged failure to warn about exposures to or identification
6 of the Listed Chemical (or any other chemical listed pursuant to Proposition 65) contained in the
7 Products. Compliance with the terms of this Consent Judgment by Atico constitutes compliance
8 with Proposition 65 with respect to the Listed Chemical in the Releasees' Products.

9 **5.2 Release of Brimer**

10 Atico waives any and all claims against Brimer, his attorneys and other representatives, for
11 any and all actions taken or statements made (or those that could have been taken or made) by
12 Brimer and his attorneys and other representatives, whether in the course of investigating claims
13 or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to
14 the Products.

15 **6. COURT APPROVAL**

16 This Consent Judgment is not effective until it is approved and entered by the Court and
17 shall be null and void if, for any reason, it is not approved and entered by the Court within one
18 year after it has been fully executed by all parties, in which event any monies that have been
19 provided to Brimer, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded
20 within fifteen (15) days after receiving written notice from Atico that the one-year period has
21 expired.

22 **7. SEVERABILITY**

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

26 **8. GOVERNING LAW**

27 The terms of this Consent Judgment shall be governed by the laws of the State of
28 California and apply within the State of California. In the event that Proposition 65 is repealed or

1 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Atico
2 may provide written notice to Brimer of any asserted change in the law, and shall have no further
3 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products
4 are so affected.

5 **9. NOTICES**

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

10 **To Atico:**

11 Renee D. Wasserman, Esq.
12 Rogers Joseph O'Donnell, a Professional Law Corporation
13 311 California Street, 10th floor
14 San Francisco, CA 94104

15 and

16 Office of the General Counsel
17 Atico International USA, Inc.
18 501 South Andrews Avenue
19 Fort Lauderdale, Florida 33301

20 **To Brimer:**

21 Proposition 65 Coordinator
22 The Chanler Group
23 2560 Ninth Street, Suite 214
24 Berkeley, CA 94710-2565

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

27 **10. COUNTERPARTS, FACSIMILE SIGNATURES**

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

14. AUTHORIZATION

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

AGREED TO:

Date: 1-5-11

AGREED TO:

Date: _____

By: 
Plaintiff, RUSSELL BRIMER

By: _____
Steven Felkowitz, Chief Executive Officer
Defendant, ATICO INTERNATIONAL
USA, INC.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

14. **AUTHORIZATION**

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

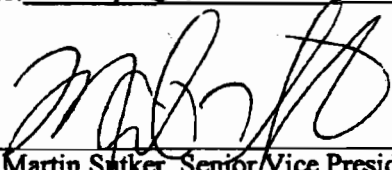
AGREED TO:

Date: _____

By: _____
Plaintiff, RUSSELL BRIMER

AGREED TO:

Date: 11/5/11

By: 
Martin Sutker, Senior Vice President
Defendant, ATICO INTERNATIONAL
USA, INC.