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EDEN MARKETING CORPORATION

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF SANTA CLARA
14 UNLIMITED CIVIL JURISDICTION
15

16
17 RUSSELL BRIMER

18 Plaintiff,

19 v.

20 EDEN MARKETING CORPORATION; and
DOES 1 through 150, inclusive,

21 Defendants.

Case No. 106 CV 057257

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

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer And Eden Marketing Corporation**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (hereinafter
4 "Brimer" or "Plaintiff") and defendant Eden Marketing Corporation, (hereafter "Eden" or
5 "Defendant"), with Brimer and Eden collectively referred to as the "Parties."

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Eden employs ten or more persons and is a person in the course of doing business for
12 purposes of Proposition 65.

13 **1.4 General Allegations**

14 Brimer alleges that Eden has manufactured, distributed and/or sold in the State of
15 California certain bowls and other glassware intended for the consumption of food or beverages
16 with colored artworks or designs on the exterior containing lead used. Lead is listed pursuant to
17 the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code
18 §§25249.5 *et seq.* ("Proposition 65"), as a chemical known to the State of California to cause birth
19 defects and other reproductive harm. Lead shall be referred to herein as the "Listed Chemical."

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as follows: bowls and
22 other glassware intended for the consumption of food or beverages with colored artworks or
23 designs on the exterior containing lead. All such bowls and other glassware intended for the
24 consumption of food or beverages with colored artworks or designs on the exterior containing lead
25 shall be referred to herein as the "Products."

26 **1.6 Notices of Violation**

27 On or about November 23, 2005, Brimer served Eden and various public enforcement
28 agencies with a document entitled "60-Day Notice of Violation" (the "Notice") that provided Eden

1 and such public enforcers with notice that alleged that Eden was in violation of California Health
2 & Safety Code §25249.6 for failing to warn consumers and customers that the Products that Eden
3 sold exposed users in California to the Listed Chemical.

4 **1.7 Complaint**

5 On February 1, 2006, Brimer, who is acting in the interest of the general public in
6 California, filed a complaint (hereafter referred to as the "Complaint" or the "Action") in the
7 Superior Court in and for the County of Santa Clara against Eden Marketing Corporation and Does
8 1 through 150, (*Brimer v. Eden Marketing Corporation*, Case No. 106 CV 057257) alleging
9 violations of Health & Safety Code §25249.6 based on the alleged exposures to the Listed
10 Chemical contained in the Products sold by Eden.

11 **1.8 No Admission**

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

20 **1.9 Consent to Jurisdiction**

21 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Eden as to the allegations contained in the Complaint, that venue is proper in the
23 County of Santa Clara and that this Court has jurisdiction to enter and enforce the provisions of
24 this Consent Judgment.

25 **1.10 Effective Date**

26 For purposes of this Consent Judgment, the term "Effective Date" shall mean December
27 22, 2006.

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

2 **2.1** After the Effective Date, Eden shall not sell, ship or offer to be shipped for sale in
3 California Products containing the Listed Chemical unless such Products are sold or shipped with
4 the clear and reasonable warnings set out in Section 2.2 or comply with the Reformulation
5 Standards set forth in Section 2.3.

6 Any warning issued for Products pursuant to this Section 2.2 below shall be prominently
7 placed with such conspicuousness as compared with other words, statements, designs, or devices
8 as to render it likely to be read and understood by an ordinary individual under customary
9 conditions before purchase or, for Products shipped directly to an individual in California, before
10 use.

11 **2.2 Product Warnings**

12 **2.2.1** Clear and Reasonable Warnings. This Section describes Eden’s options for
13 satisfying the warning obligations required by Section 2.1, depending, in part, on the manner of
14 sale:

15 **(a) Retail Store Sales**

16 **(i) Product Labeling.** From the Effective Date, a warning will
17 be affixed to the packaging, labeling or directly on the Product by Eden or its agent, that states:

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

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

27 ///

28 ///

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

4 A point-of-sale warning shall be provided in a manner such that the consumer understands
5 to which specific Products the warning applies.

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

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

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

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

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

28 The Designated Symbol (shown on Exhibit A attached hereto) must appear on the same

1 page and in close proximity to the display and/or description of the Product. On each page where
2 the Designated Symbol appears, Eden must provide a header or footer directing the consumer to
3 the warning language and definition of the Designated Symbol.

4 If Defendant elects to provide warnings in the mail order catalog, then the warnings must
5 be included in all catalogs offering to sell one or more Products printed after December 31, 2006.

6 **(ii) Internet Web Sites and Pages.** A warning may be given in
7 conjunction with the sale of the Product via the internet, provided it appears either: (a) on the
8 same web page on which the Product is displayed; (b) on the same web page as the order form for
9 the Product; (c) on the same page as the price for any Product; or (d) on one or more web pages
10 displayed to a purchaser during the checkout process. The following warning statement shall be
11 used and shall appear in any of the above instances adjacent to or immediately following the
12 display, description, or price of the Product for which it is given in the same type size or larger as
13 the product description text:

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

17 Alternatively, the Designated Symbol may appear adjacent to or immediately following the
18 display, description or price of the Product for which a warning is being given, provided that the
19 following warning statement also appears elsewhere on the same web page:

20 **WARNING:** Products identified on this page with the
21 following symbol use materials as colored
22 decorations on their exterior that contain lead,
a chemical known to the State of California to
23 cause birth defects and other reproductive
harm: [show Designated Symbol]

24 **(iii) Package Insert or Label.** For all Products sold by catalog
25 or via the internet, a warning may be provided with the Product when it is shipped directly to an
26 individual in California, by either: (a) affixing the following warning language to the packaging,
27 labeling or directly to a specific Product; (b) inserting a warning card measuring at least 4" x 6" in
28 the shipping carton which contains the following warning language; or (c) by placing the

1 following warning statement on the packing slip or customer invoice on the line directly below the
2 description of the Product on the packing slip or customer invoice:

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

6 Alternatively, Eden may place the following language on the packing slip or invoice and
7 specifically identifying the Product in lettering of the same size or larger as the description of the
8 Product:

9 **WARNING:** The materials used as colored decorations on
10 the exterior of the following product(s)
11 contain lead, a chemical known to the State of
 California to cause birth defects or other
 reproductive harm: [*list products for which*
 warning is given].

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

16 **2.2.2 Exceptions**

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

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

20 **2.3 Reformulation Standards**

21 The following Products shall be deemed "Reformulated Products" and to comply with
22 Proposition 65 and be exempt from any Proposition 65 warning requirements under Sections 2.2:
23 The products must only utilize decorating materials that contain six one-hundredths of one percent
24 (0.06%) or less of lead by weight; and there must be no detectable lead in either the lip-and-rim
25 area or in the food contact surface area.

26 **2.4 Reformulation Goal**

27 Eden hereby commits to ensure that all Products that it offers for sale in California after
28

1 December 31, 2006, shall qualify as Reformulated Products, as defined in Section 2.3 of this
2 consent judgment.

3 **3. MONETARY PAYMENTS**

4 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

5 The total penalty amount shall be \$10,000 which shall be paid by Eden as set forth herein.
6 Pursuant to Health & Safety Code §25249.7(b), Eden shall pay one-third of the penalty, in the
7 amount of \$3,333, on or before December 29, 2006, which payment shall be held in trust by
8 HIRST & CHANLER LLP until court approval of this Consent Judgment. An additional one-third
9 of the penalty, in the amount of \$3,333, shall be paid on or before January 26, 2007. The final
10 one-third of the penalty, in the amount of \$3,334, shall be paid on or before April 2, 2007. Said
11 payments shall be made payable to the "HIRST & CHANLER LLP in Trust For Russell Brimer"
12 and shall be mailed to plaintiff's counsel at the following address:

13 HIRST & CHANLER LLP
14 Attn: Proposition 65 Controller
15 2560 Ninth Street
16 Parker Plaza, Suite 214
17 Berkeley, CA 94710-2565

18 **3.2 Apportionment of Penalties Received**

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

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

26 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
27 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
28 this fee issue to be resolved after the material terms of the agreement had been settled. Eden then
expressed a desire to resolve the fee and cost issue contemporaneously with the other settlement
terms. The Parties then attempted to (and did) reach an accord on the compensation due to Brimer

1 and his counsel under the private attorney general doctrine codified at California Code of Civil
2 Procedure §1021.5 for all work performed through the Effective Date of this Consent Judgment,
3 and anticipated for issuing a supplemental notice and submitting this Consent Judgment for Court
4 approval. Under the private attorney general doctrine, Eden shall reimburse Brimer and his
5 counsel for fees and costs incurred as a result of investigating, bringing this matter to Eden's
6 attention, litigating and negotiating a settlement in the public interest and seeking the Court's
7 approval of the settlement agreement. Eden shall pay Brimer and his counsel \$25,000 for all
8 attorneys' fees, expert and investigation fees, litigation and related costs. Payment of said fees and
9 costs will be made in two installments: One-third of this amount, in the amount of \$8,334, will be
10 made on or before December 29, 2006. An additional one-third of this amount, in the amount of
11 \$8,333, will be payable on or before January 26, 2007. The final one-third of this amount, in the
12 amount of \$8,333, will be payable on or before April 2, 2007. Payments shall be made payable to
13 HIRST & CHANLER LLP and shall be mailed to the following address:

14 HIRST & CHANLER LLP
15 Attn: Proposition 65 Controller
16 2560 Ninth Street
17 Parker Plaza, Suite 214
18 Berkeley, CA 94710-2565

19 **5. RELEASE OF ALL CLAIMS**

20 **5.1 Release of Eden and Downstream Customers**

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

1 corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,
2 shareholders, agents, and employees, and sister and parent entities (collectively "Releasees"). This
3 release is limited to those claims that arise under Proposition 65, as such claims relate to Eden's
4 alleged failure to warn about exposures to or identification of the Listed Chemical contained in the
5 Products.

6 The Parties further understand and agree that this release shall not extend upstream to any
7 entities that manufactured the Products or any component parts thereof, or any distributors or
8 suppliers who sold the Products or any component parts thereof to Eden.

9 **5.2 Eden's Release of Brimer**

10 Eden 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 or
13 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 Plaintiff, or his counsel pursuant to Section 3 and/or Section 4 above, shall be
20 refunded within fifteen (15) days after receiving written notice from Eden that the one-year period
21 has expired.

22 **7. SEVERABILITY**

23 If, subsequent to court approval 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. ATTORNEYS' FEES**

27 In the event that, after Court approval: (1) a dispute arises with respect to any provision of
28 this Consent Judgment; (2) Eden or any third party seeks modification of this Consent Judgment

1 pursuant to Section 14 below; or (3) Brimer takes reasonable and necessary steps to enforce the
2 terms of this Consent Judgment, Brimer shall be entitled to his reasonable attorneys' fees and costs
3 pursuant to CCP §1021.5.

4 **9. GOVERNING LAW**

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

11 **10. NOTICES**

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

16 To Eden:

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18 Eden Marketing Corporation
19 c/o Ginam Lee, Esq.
20 GINAM LEE & ASSOCIATES
21 880 West First Street, Suite 523
22 Los Angeles, CA 90012

23 To Brimer:

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

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

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1 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

8 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

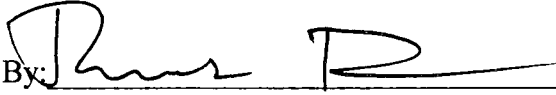
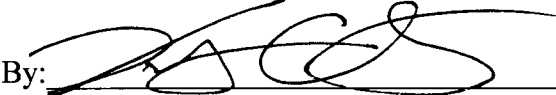
9 Brimer and Eden agree to mutually employ their best efforts to support the entry of this
10 Agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a
11 timely manner. The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a
12 noticed motion is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

18 **14. MODIFICATION**

19 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
20 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
21 of any Party and entry of a modified Consent Judgment by the Court. The Attorney General shall
22 be served with notice of any proposed modification to this Consent Judgment at least fifteen (15)
23 days in advance of its consideration by the Court.

1 **15. AUTHORIZATION**

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

<p style="text-align: center;">AGREED TO:</p> <p>Date: <u>12-21-06</u></p> <p>By: <u></u> Plaintiff, Russell Brimer</p>	<p style="text-align: center;">AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Defendant, Eden Marketing Corporation</p>
<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>HIRST & CHANLER LLP</p> <p>By: <u></u> Keith G. Adams Attorneys for Plaintiff RUSSELL BRIMER</p>	<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>GINAM LEE & ASSOCIATES</p> <p>By: _____ Ginam Lee Attorneys for Defendant EDEN MARKETING CORPORATION</p>

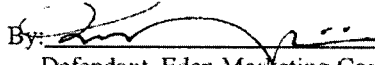

20 **IT IS SO ORDERED.**

21 Date: _____

22 _____
JUDGE OF THE SUPERIOR COURT

1 **15. AUTHORIZATION**

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

<p>5</p> <p>6 AGREED TO:</p> <p>7 Date: _____</p> <p>8</p> <p>9</p> <p>10 By: _____</p> <p>11 Plaintiff, Russell Brimer</p>	<p>6 AGREED TO:</p> <p>7 Date: <u>11/15/07</u></p> <p>8</p> <p>9</p> <p>10 By: </p> <p>11 Defendant, Eden Marketing Corporation</p>
<p>12 APPROVED AS TO FORM:</p> <p>13 Date: _____</p> <p>14 HIRST & CHANLER LLP</p> <p>15</p> <p>16 By: _____</p> <p>17 Keith G. Adams</p> <p>18 Attorneys for Plaintiff</p> <p>19 RUSSELL BRIMER</p>	<p>12 APPROVED AS TO FORM:</p> <p>13 Date: <u>12/29/06</u></p> <p>14 GINAM LEE & ASSOCIATES</p> <p>15</p> <p>16 By: </p> <p>17 Ginam Lee</p> <p>18 Attorneys for Defendant</p> <p>19 EDEN MARKETING CORPORATION</p>

20 **IT IS SO ORDERED.**

21 Date: _____

22 _____
23 JUDGE OF THE SUPERIOR COURT

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Exhibit A

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

