

REVISED
MAY 29 2014

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ENDORSED
FILED
ALAMEDA COUNTY
SEP - 4 2014
CLERK OF THE SUPERIOR COURT
By DIANNE HYATT
Deputy

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA
12 UNLIMITED CIVIL JURISDICTION

13 RUSSELL BRIMER,
14 Plaintiff,
15 v.
16 RASHMAN CORPORATION; and DOES 1-
17 150, inclusive,
18 Defendants.

Case No. RG 13686058

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

Date: August 27, 2014
Time: 2:30 p.m.
Dept: 522
Judge: Hon. Dennis Hayashi
Reference No.: R-1517189

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1 Plaintiff Russell Brimer, and Rashman Corporation, having agreed through their
2 respective counsel that Judgment be entered pursuant to the terms of their settlement
3 agreement in the form of an Amended Consent Judgment, and following this Court's
4 issuance of an Order approving this Proposition 65 settlement and Amended Consent
5 Judgment.

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

11
12 **IT IS SO ORDERED.**

13
14
15 Dated: SEP - 2 2014

DENNIS HAYASHI

JUDGE OF THE SUPERIOR COURT

EXHIBIT 1

1
2 **1. INTRODUCTION**

3 **1.1 Russell Brimer and Rashman Corporation**

4 This Amended Consent Judgment is entered into by and between plaintiff Russell Brimer
5 ("Brimer" or "Plaintiff") and Rashman Corporation ("Rashman" or "Defendant"), with Brimer and
6 Rashman collectively referred to as the "Parties."

7 **1.2 Russell Brimer**

8 Brimer is an individual residing in the State of California who seeks to promote awareness
9 of exposure to toxic chemicals and to improve human health by reducing or eliminating hazardous
10 substances contained in consumer and commercial products. Brimer brings this Proposition 65
11 action acting in the interest of the general public as a private attorney general after service of a 60-
12 Day Notice of Violation ("Notice") had been sent to the Attorney General of the State of California
13 and the District Attorney for Each of the 58 counties in California and the City Attorney for Los
14 Angeles, San Diego, San Jose, San Francisco and Sacramento (hereafter "Governmental Entities").
15 This Proposition 65 action was brought by Brimer more than 60 days after service of the Notice on
16 the Governmental Entities.

17 **1.3 Rashman Corporation**

18 Brimer alleges that Rashman employs ten or more persons and is a person in the course of
19 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
20 California Health & Safety Code § 25249.6, *et seq.* ("Proposition 65").

21 **1.4 General Allegations**

22 Brimer alleges that Rashman has manufactured, imported, distributed and/or sold ballpoint
23 pen grips containing di(2-ethylhexyl)phthalate ("DEHP") in California without the requisite
24 Proposition 65 health hazard warnings. DEHP is listed pursuant to Proposition 65 as known to the
25 State of California to cause birth defects and other reproductive harm.

26 **1.5 Product Description**

27 The products that are covered by this Amended Consent Judgment are defined as ballpoint
28 pens having grips containing DEHP including, but not limited to, the *Prestige Medical Chart Pen*,

1 S400 (#7 86511 56131 4), manufactured, imported, distributed and/or sold by Rashman in
2 California, hereinafter referred to as the "Noticed Products."

3 In addition to the above, this Amended Consent Judgment covers the *Prestige Medical*
4 *Royal Fiberglass Tape Measure, 45-ROY* (#7 86511 78241 2), *Prestige Medical I.D. Pouch-Black*
5 *19-BLK* (#7 86511 19001 9), *Prestige Medical anatomy Dissecting Kit of 12 Pieces AK-1* (#7 86511
6 *00901 4*), *Prestige Medical Bag 753* (#7 86511 75346 7), *Prestige Medical Aneroid*
7 *Sphygmomanometer Sprague Kit A1-105* (#7 86511 78651 9), which Rashman manufactured,
8 imported, distributed, and/or sold in the State of California, hereinafter referred to as the
9 "Additional Products." The Noticed Products and the Additional Products are hereinafter referred
10 to collectively as the "Products."

11
12 **1.6 Notice of Violation**

13
14 On July 11, 2012, Brimer served Rashman and various public enforcement agencies, with a
15 document entitled "60-Day Notice of Violation" ("Notice") that provided the recipients with notice
16 of alleged violations of California Health & Safety Code § 25249.6 based on Rashman's alleged
17 failure to warn consumers that the Noticed Products exposed users in California to DEHP. To the
18 best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the
19 allegations set forth in the Notice.

20 **1.7 Complaint**

21 On July 1, 2013, Brimer filed a complaint in the Superior Court in and for the County of
22 Alameda against Rashman and Does 1 through 150, *Brimer v. Rashman Corporation, et al.*, Case
23 No. RG13686058 (the "Complaint"), alleging violations of California Health & Safety Code
24 § 25249.6, based on the alleged exposures to DEHP contained in the Noticed Products sold by
25 Rashman.

26 **1.8 No Admission**

27 Rashman denies the material, factual and legal allegations contained in Brimer's Notice and
28 Complaint and maintains that all Products that it has manufactured, imported, distributed, and/or

1 sold in California, including the Products, have been and are in compliance with all laws. Nothing
2 in this Amended Consent Judgment shall be construed as an admission by Rashman of any fact,
3 finding, issue of law, or violation of law, nor shall compliance with this Amended Consent
4 Judgment constitute or be construed as an admission by Rashman of any fact, finding, conclusion,
5 issue of law, or violation of law. However, this Section shall not diminish or otherwise affect
6 Rashman's obligations, responsibilities, and duties under this Amended Consent Judgment.

7 **1.9 Consent to Jurisdiction**

8 For purposes of this Amended Consent Judgment only, the Parties stipulate that this Court
9 has jurisdiction over Rashman as to the allegations contained in the Complaint, that venue is proper
10 in the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of
11 this Amended Consent Judgment.

12 **1.10 Effective Date**

13 For purposes of this Amended Consent Judgment, the term "Effective Date" shall mean the
14 date the Amended Consent Judgment is approved by the Court.

15 **2. INJUNCTIVE RELIEF; REFORMULATION AND WARNINGS**

16 **2.1 Injunctive Relief**

17 As of December 16, 2013, Rashman shall only acquire for distribution to or sale in
18 California, Noticed Products that: (1) qualify as Reformulated Products as defined in Section 2.2
19 below; or (2) include one of the clear and reasonable warnings set forth in Section 2.3 below. As of
20 July 15, 2014, Rashman shall only acquire for distribution to or sale in California, Additional
21 Products that: (1) qualify as Reformulated Products as defined in Section 2.2 below; or (2) include
22 one of the clear and reasonable warnings set forth in Section 2.3 below.

23 **2.2 Reformulation Standards**

24 Reformulated Products are defined as those Products containing DEHP in concentrations
25 less than 0.1 percent (1,000 parts per million) in each Accessible Component when analyzed
26 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any
27 other methodology utilized by federal or state agencies for the purpose of determining the DEHP
28 content in a solid substance. "Accessible Component," as used in this Amended Consent Judgment,

1 means a component of any Product that can be touched by a person during normal, intended and
2 foreseeable use of the Product.

3 **2.3 Product Warnings**

4 Commencing on December 16, 2013 for all Noticed Products, and July 15, 2014 for all
5 Additional Products, Rashman shall, for all Products, other than Reformulated Products, sold in
6 California, and all Products, other than Reformulated Products, sold to customers located outside of
7 California that have a California warehouse, distribution center, maintain a retail outlet in California
8 or has made internet sales into California on or after July 15, 2014, provide clear and reasonable
9 warnings as set forth in subsections 2.3(a) and (b). Each warning shall be prominently placed with
10 such conspicuousness as compared with other words, statements, designs, or devices as to render it
11 likely to be read and understood by an ordinary individual under customary conditions before
12 purchase or use. Each warning shall be provided in a manner such that the consumer or user
13 understands to which *specific* Products the warning applies, so as to minimize the risk of consumer
14 confusion.

15 (a) **Product Labeling.** Rashman shall affix a warning to the packaging,
16 labeling, or directly on each of the Products, other than Reformulated Products, sold to California
17 residents and to all Products, other than Reformulated Products, sold to customers located outside of
18 California that have a California warehouse, distribution center, maintain a retail outlet in California
19 or has made internet sales into California on or after July 15, 2014, that states:

20 **WARNING:** This product contains DEHP, a chemical known to
21 the State of California to cause birth defects and
22 other reproductive harm.

23 (b) **Internet Website Warning.** If after July 15, 2014, Rashman sells the
24 Products, other than Reformulated Products, via the internet, a warning shall be given in
25 conjunction with the sale of the Products on the Rashman website, which warning shall appear
26 either: (a) on the same web page on which a Product is displayed; (b) on the same web page as the
27 order form for a Product; (c) on the same page as the price for any Product; or (d) on one or more
28 web pages displayed to a purchaser during the checkout process. The following warning statement

1 shall be used and shall appear in any of the above instances adjacent to or immediately following
2 the display, description, or price of the Product for which it is given in the same type size or larger
3 than the Product description text:

4 **WARNING:** This product contains DEHP, a chemical known to
5 the State of California to cause birth defects and
6 other reproductive harm.

7 Alternatively, the designated symbol may appear adjacent to or immediately following the
8 display, description, or price of the Product for which a warning is being given, provided that the
9 following warning statement also appears elsewhere on the same web page, as follows:

10 **WARNING:** Products identified on this page with the following
11 symbol ▼ contain DEHP, a chemical known to the
12 State of California to cause birth defects and other
13 reproductive harm.

14 **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

15 In settlement of all the claims related to the Noticed Products referred to in this Amended
16 Consent Judgment, and subject to the qualification set forth in paragraphs 3.1 and 3.2, Rashman
17 shall pay a total of \$6,000 in civil penalties in accordance with this Section. Each penalty payment
18 will be allocated in accordance with California Health & Safety Code §§ 25249.12(c)(1) & (d), with
19 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment
20 (“OEHHA”) and the remaining 25% of the penalty remitted to Brimer as follows:

21 **3.1 Initial Civil Penalty**

22 Rashman has paid an initial civil penalty in the amount of \$2,000 on or before December 1,
23 2013, Rashman by issuing two separate checks to: (a) “OEHHA” in the amount of \$1,500; and (b)
24 “The Chanler Group in Trust for Russell Brimer” in the amount of \$500. All initial civil penalty
25 payments have been delivered to the addresses listed in Section 3.3 below.

26 **3.2 Final Civil Penalty**

27 Rashman shall not have to pay a final civil penalty of \$4,000 on or before December 31,
28 2013 as prior to that date an officer of Rashman provided Brimer with written certification that, as
of December 16, 2013 and continuing into the future, Rashman has met the reformulation standard

1 specified in Section 2.2 above, such that all Noticed Products manufactured, imported, distributed,
2 sold and offered for sale in California by Rashman are Reformulated Products. Brimer
3 acknowledges having received such certification on or before December 30, 2013. Therefore, the
4 final civil penalty provided in this Section has been waived.

5 **3.3 Payment Procedures**

6 **3.3.1 Issuance of Payments.** Payments shall be delivered as follows:

7 (a) All payments owed to Brimer, pursuant to Sections 3.1 through 3.2,
8 shall be delivered to the following payment address:

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

12 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to
13 Sections 3.1 through 3.2, shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at
14 the following addresses:

15 For United States Postal Service Delivery:

16 Mike Gyurics
Fiscal Operations Branch Chief
17 Office of Environmental Health Hazard Assessment
P.O. Box 4010
18 Sacramento, CA 95812-4010

19 For Non-United States Postal Service Delivery:

20 Mike Gyurics
Fiscal Operations Branch Chief
21 Office of Environmental Health Hazard Assessment
1001 I Street
22 Sacramento, CA 95814

23 With a copy of the checks payable to OEHHA mailed to The Chanler Group at the address
24 set forth above in 3.3.1(a), as proof of payment to OEHHA.

25 **3.3.2 Issuance of 1099 Forms.** After each penalty payment, Rashman shall issue
26 separate 1099 forms for each payment to Brimer, whose address and tax identification number
27 shall be furnished upon request after this Amended Consent Judgment has been fully executed by
28 the Parties, and OEHHA at the addresses listed in Section 3.3.1(b) above.

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

2 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
3 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
4 issue to be resolved after the material terms of the agreement had been settled. Rashman then
5 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
6 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to
7 Brimer and his counsel under general contract principles and the private attorney general doctrine
8 codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual
9 execution of this agreement. Rashman shall pay the total sum of \$31,000 for fees and costs incurred
10 as a result of investigating, bringing this matter to Rashman's attention, negotiating a settlement in
11 the public interest, and in obtaining the Court's approval of this Amended Consent Judgment in the
12 public interest. Rashman has issued a separate 1099 for fees and costs (EIN: 94-3171522), and has
13 issued two checks payable to "The Chanler Group" and it is hereby acknowledged that Rashman
14 delivered the first payment of \$26,000 on or before December 1, 2013 to the address listed in
15 Section 3.3.1(a) above, and shall hereafter deliver the second payment of \$5,000 on or before May
16 15, 2014 to the address listed in Section 3.3.1(a) above.

17 **5. CLAIMS COVERED AND RELEASED**

18 **5.1 Brimer's Release of Proposition 65 Claims**

19 Brimer acting on his own behalf and in the public interest releases Rashman, its parents,
20 subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys,
21 and each entity to whom Rashman directly or indirectly distributes or sells Products, including, but
22 not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative
23 members, and licensees ("Releasees"), from all claims for violations of Proposition 65 up through
24 the Effective Date based on exposure to DEHP from the Noticed Products set forth in the Notice.
25 Compliance with the terms of this Amended Consent Judgment constitutes compliance with
26 Proposition 65 with respect to exposures to DEHP from the Noticed Products as set forth in the
27 Notice.
28

1 **5.2 Brimer's Individual Release of Claims**

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

8 **5.3 Rashman's Release of Brimer**

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

15 **6. COURT APPROVAL**

16 This Amended Consent Judgment as to the Noticed Products is not effective until it is
17 approved and entered by the Court and shall be null and void as to the the Noticed Products if, for any
18 reason, it is not approved and entered by the Court within one year after it has been fully executed
19 by all Parties. If the Court does not approve and enter the Amended Consent Judgment as to the
20 Noticed Products within one year of the date this Amended consent Judgment is fully executed by
21 the Parties, any monies that have been provided to OEHHA or held in trust for Brimer or his
22 counsel pursuant to Section 3, above, shall be refunded to Rashman within 15 days. Upon
23 execution, Brimer shall promptly file an appropriate motion to approve this Amended Consent
24 Judgment with the Court.

25 **7. SEVERABILITY**

26 If, subsequent to the execution of this Amended Consent Judgment, any of the provisions of
27 this Amended Consent Judgment are held by a court to be unenforceable, the validity of the
28 enforceable provisions remaining shall not be adversely affected.

1 **8. GOVERNING LAW**

2 The terms of this Amended Consent Judgment shall be governed by the laws of the State of
3 California and apply within the State of California. In the event that Proposition 65 is repealed,
4 preempted or is otherwise rendered inapplicable by reason of law generally, or if any of the
5 provisions of this Amended Consent Judgment are rendered inapplicable or are no longer required
6 as a result of any such repeal or preemption or rendered inapplicable by reason of law generally as
7 to the Products, then Rashman shall provide written notice to Brimer of any asserted change in the
8 law, and shall have no further obligations pursuant to this Amended Consent Judgment with respect
9 to, and to the extent that, the Products are so affected. Nothing in this Amended Consent Judgment
10 shall be interpreted to relieve Rashman from any obligation to comply with any pertinent state or
11 federal toxics control law.

12 **9. NOTICES**

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

17 To Rashman:

18 Steven L. Feldman, Esq.
19 Goldfarb, Sturman & Averbach
20 15760 Ventura Blvd.
21 Nineteenth Floor
22 Encino, CA 91436-3012

17 To Brimer:

18 Proposition 65 Coordinator
19 The Chanler Group
20 2560 Ninth Street
21 Parker Plaza, Suite 214
22 Berkeley, CA 94710-2565

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

25 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

1 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

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

4 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

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

14 **13. MODIFICATION**

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

18 **14. AUTHORIZATION**

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

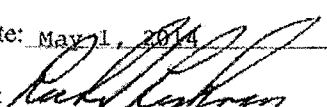
22 AGREED TO:

22 AGREED TO:

23
24 Date: May 9, 2014

23
24 Date: May 1, 2014

25 By: 
26 Plaintiff, Russell Brimer

25 By: 
26 Defendant, Rashman Corporation
27 Richard Rashman, its CEO