

1 Clifford A. Chanler, State Bar No. 135534
2 Josh Voorhees, State Bar No. 241436
3 Brian C. Johnson, State Bar No. 235965
4 THE CHANLER GROUP
5 2560 Ninth Street
6 Parker Plaza, Suite 214
7 Berkeley, CA 94710
8 Telephone: (510) 848-8880
9 Facsimile: (510) 848-8118

6 Attorneys for Plaintiff
7 RUSSELL BRIMER

ENDORSED
FILED
OCT - 1 2015
David H. Menezel, Clerk of the Superior Court
County of Santa Clara, California
By: Menezel
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SANTA CLARA
11 UNLIMITED CIVIL JURISDICTION

12 RUSSELL BRIMER,
13 Plaintiff,
14 v.
15 ROTARY CORPORATION; and DOES 1 – 150,
16 inclusive,
17 Defendants.

Case No. 115CV283508
**[PROPOSED] JUDGMENT
PURSUANT TO TERMS OF
PROPOSITION 65 SETTLEMENT
AND CONSENT JUDGMENT**
Date: October 1, 2015
Time: 9:00 a.m.
Dept.: 3.
Judge: Hon. William J. Elfving

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

In the above-entitled action, plaintiff Russell Brimer, and defendant Rotary Corporation, having agreed through their respective counsel that Judgment be entered pursuant to the terms of their settlement agreement in the form of a [Proposed] Consent Judgment (“Consent Judgment”), and following this Court’s issuance of an Order approving this Proposition 65 settlement and Consent Judgment on October 1, 2015.

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

IT IS SO ORDERED.

Dated: OCT -1 2015

William J. Elfving
JUDGE OF THE SUPERIOR COURT

EXHIBIT A

1 Clifford A. Chanler, State Bar No. 135534
2 Josh Voorhees, State Bar No. 241436
3 Brian Johnson, State Bar No. 235965
4 THE CHANLER GROUP
5 2560 Ninth Street
6 Parker Plaza, Suite 214
7 Berkeley, CA 94710-2565
8 Telephone: (510) 848-8880
9 Facsimile: (510) 848-8118

10 Attorneys for Plaintiff
11 RUSSELL BRIMER

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

15 RUSSELL BRIMER
16 Plaintiff
17 v.
18 ROTARY CORPORATION,
19 Defendant.

Case No. 115CV283508

**[PROPOSED] CONSENT
JUDGMENT**

Action Filed: July 24, 2015

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Rotary Corporation**

3 This [Proposed] Consent Judgment (“Consent Judgment”) is entered into by and between
4 plaintiff, Russell Brimer (“Plaintiff” or “Brimer”), and defendant, Rotary Corporation
5 (“Defendant” or “Rotary”). Plaintiff and Defendant are each individually referred to as a “Party”
6 and 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
9 awareness of exposure to toxic chemicals and improve human health by reducing or eliminating
10 hazardous substances contained in consumer and commercial products.

11 **1.3 Rotary Corporation**

12 Rotary employs ten or more persons and is a “person in the course of doing business” for
13 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
14 Safety Code Section 25249.5 *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

16 Brimer alleges that Rotary manufactured, imported and/or distributed for sale in the
17 State of California vinyl/poly vinyl chloride (“PVC”) tubing that may be touched and handled
18 by consumers and other individuals containing di(2-ethylhexyl)phthalate (“DEHP”) without first
19 providing the exposure warning required by Proposition 65.

20 **1.5 Listed Chemicals**

21 DEHP is a phthalate chemical listed under Proposition 65 as a chemical known to the
22 State of California to cause birth defects or other reproductive harm. Other phthalate chemicals
23 listed under Proposition 65 as chemicals known to the State of California to cause birth defects
24 or other reproductive harm include, but are not limited to, butyl benzyl phthalate (“BBP”), di-n-
25 butyl phthalate (“DBP”) and Di-isodecyl phthalate (“DIDP”). In addition, DEHP and
26 Diisononyl phthalate (“DINP”) have been listed under Proposition 65 as chemicals known to the
27 State of California to cause cancer. DEHP, BBP, DBP, DIDP and DINP are collectively
28 referred to herein as the “Listed Chemicals.”

1 **1.6 Product Description**

2 The products that are covered by this Consent Judgment are: (a) vinyl/PVC tubing,
3 including, but not limited to fuel lines, whether freestanding or serving as a component of
4 another product manufactured imported, sold, offered for sale and/or distributed by Rotary
5 under its own name or other brand names (the “Covered Products”), and (b) other pliable PVC-
6 containing replacement parts, accessories, and protection devices for use in or with outdoor
7 power equipment which are manufactured by or for Rotary (collectively the “Additional
8 Products”).

9 **1.7 Notice of Violation**

10 On or about March 31, 2015, Brimer served Rotary, others and certain requisite public
11 enforcement agencies with a document entitled “60-Day Notice of Violation” (“Notice”) under
12 Proposition 65 that provided the recipients with notice that Rotary was in violation of
13 Proposition 65 for failing to warn customers and consumers in California that the Covered
14 Products expose users to DEHP.

15 **1.8 Complaint**

16 As no authorized public prosecutor of Proposition 65 filed a claim against Rotary based
17 on the allegations set forth in the Notice prior to the expiration of the 60 day notice period,
18 Brimer filed a complaint on July 24, 2015, in the Superior Court of California for the County of
19 Santa Clara (the “Court”), *Brimer v. Rotary Corporation, et al.*, Case No. 115CV283508,
20 naming Rotary as a defendant and alleging claims for violations of Health and Safety Code
21 section 25249.6, based on the alleged exposures to DEHP in vinyl/PVC tubing distributed for
22 sale or sold by Rotary in the State of California (hereinafter “Action” or “Complaint”).

23 **1.9 Consent to Jurisdiction**

24 For purposes of this Consent Judgment only, the Parties stipulate that the Court has
25 subject matter jurisdiction over the allegations in the Complaint and personal jurisdiction over
26 Rotary as to the allegations in the Complaint, that venue is proper in the County of Santa Clara,
27 and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment.

28

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

1.10 No Admission

Rotary denies the material, factual and legal allegations contained in Brimer’s Notice and Complaint and maintains that all products that it has sold, manufactured, imported and/or distributed in California, including the Covered Products and Additional Products, have been and are in compliance with all laws. Nothing in this Consent Judgment is or shall be construed as an admission by the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an admission by Rotary of any fact, conclusion of law, issue of law, or violation of law. This section shall not, however, diminish or otherwise affect Rotary’s obligations, responsibilities, and duties under this Consent Judgment.

1.11 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” shall mean the date on which this Consent Judgment is approved by the Court, including any tentative ruling that is unopposed.

2. INJUNCTIVE RELIEF

2.1 Covered Products.

As of the Effective Date, Rotary shall only distribute for sale or sell in California Covered Products that: (1) are “Phthalate Free”; or (2) carry a clear and reasonable Proposition 65 warning as specified in Section 2.1.B below.¹

A. Reformulation

For purposes of this Settlement Agreement, “Phthalate Free” shall mean Covered Products containing less than or equal to 1,000 parts per million (“ppm”) of each Listed Chemical when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and

¹ Covered Products that were acquired or supplied to third parties by Rotary prior to the date of execution of this Consent Judgment shall be deemed exempted from the requirements of Sections 2.1.A and 2.1.B and permitted to be sold through as previously manufactured, packaged or labeled.

1 8270C or other methods approved by U.S. government agencies to measure the phthalate content
2 of plastics or poly vinyl chloride.

3 **B. Warnings**

4 To the extent it does not address its obligations through reformulation meeting the criteria
5 set forth in Section 2.1.A of this Consent Judgment, Rotary shall address its Proposition 65
6 obligations for Listed Chemicals in Covered Products by affixing a warning to the packaging of,
7 or, if no packaging exists, directly on, each non-reformulated Covered Product sold in California
8 that states:

9 **WARNING:** This product contains one or more phthalate
10 chemicals known to the State of California
11 to cause birth defects and other reproductive
harm.

12 Any warning issued pursuant to this Section 2.1.B shall be prominently placed with such
13 conspicuousness as compared with other words, statements, designs, or devices as to render it
14 likely to be read and understood by an ordinary individual under customary conditions before
15 purchase.

16 **2.2 Additional Products.**

17 Within 120 days following the Effective Date, to the extent it already has not done so,
18 Rotary shall require its suppliers of the Additional Products (as delineated in Section 1.6 above)
19 to address the same Phthalate Free requirements it has imposed on its suppliers of the Covered
20 Products. Rotary shall not thereafter acquire, import, distribute, or offer Additional Products for
21 sale in California unless they are Phthalate Free or carry a clear and reasonable Proposition 65
22 warning as specified in Section 2.1.B above.²

23 ///

24 ///

25 _____
26
27 ² Additional Products that were acquired or supplied to third parties by Rotary prior to the
28 date of execution of this Consent Judgment shall also be deemed exempted from the requirements
of Section 2.2 and permitted to be sold through as previously manufactured, packaged or labeled.

1 **3. MONETARY PAYMENTS**

2 **3.1 Civil Penalties Pursuant To Health & Safety Code § 25249.7(b)**

3 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the matters referred to
4 in this Consent Judgment and addressed in Section 2 above, Rotary shall pay civil penalties
5 totaling \$40,000 in two separate installments. Each civil penalty payment Rotary makes shall be
6 allocated according to Health & Safety Code § 25249.12(c)(1) and (d) with 75% of the penalty
7 amount paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”),
8 and the remaining 25% of the penalty paid to Brimer.

9 **3.2 Initial Civil Penalty**

10 On or before five (5) days following the mutual execution of this Consent Judgment by
11 the Parties, Rotary shall deposit an initial civil penalty amount of \$10,000 in its counsel’s client
12 trust account, which shall be held pending the Court’s approval of this Consent Judgment. Rotary
13 or its counsel shall provide The Chanler Group with written confirmation within five days of the
14 funds being so deposited. Within five days of the date that this Consent Judgment is approved by
15 the Court, counsel for Rotary shall direct its client trust account to issue two separate checks for
16 the initial civil penalty payment to: (a) “OEHHA” in the amount of \$7,500; and (b) Russell
17 Brimer, Client Trust Account” in the amount of \$2,500. The checks shall then be transmitted to
18 the address show in Section 3.3.A below.

19 **3.3 Final Civil Penalty**

20 Provided that this Consent Judgment has been approved and entered by the Court, Rotary
21 will make a final civil penalty payment of \$30,000 by no later than August 31, 2016. Pursuant to
22 title 11 California Code of Regulations, section 3203(c), eighty percent (80%) of the final civil
23 penalty payment shall be waived, however, if by no later than July 31, 2016, a duly authorized
24 official of Rotary certifies in writing to Plaintiff that it has implemented the Phthalate Free
25 requirements for at least eighty percent (80%) of the Covered Products and Additional Products
26 offered for sale in California combined. Alternatively, the final civil penalty payment shall be
27 waived in its entirety if a duly authorized official of Rotary instead certifies in writing to Plaintiff
28 by July 31, 2016 that it has implemented the Phthalate Free requirements for all of the Covered

1 and Additional Products set forth in Section 1.6 above. Time is of the essence with respect to the
2 dates identified for the provision of certifications to implementing reformulation for the Covered
3 Products and Additional Products in lieu of making a portion or all of the final civil penalty
4 payment under this Section. Unless waived entirely, all penalty payments shall be allocated
5 according to Health & Safety Code § 25249.12(c)(1) and (d) with 75% of the penalty amount paid
6 to OEHHA, and the remaining 25% of the penalty paid to Brimer, and shall be delivered to the
7 address listed in Section 3.3.A below.

8 **3.4 Reimbursement of Plaintiff's 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
11 leaving the issue to be resolved after the material terms of the agreement had been settled.
12 Shortly after all other settlement terms had been finalized, Rotary expressed a desire to resolve
13 the fees and costs. The Parties then attempted to (and did) reach an accord on the compensation
14 due to Brimer and his counsel under general contract principles and the private attorney general
15 doctrine codified at Code of Civil Procedure section 1021.5 for all work performed or to be
16 performed by Brimer and his counsel in this matter, exclusive of fees and costs incurred on
17 appeal, if any. Under these legal principles, on or before five (5) days following the mutual
18 execution of this Consent Judgment by the Parties, Rotary shall issue a check in the amount of
19 \$38,600 to its counsel's client trust account, which shall be held pending the Court's approval of
20 this Consent Judgment. Rotary or its counsel shall provide The Chanler Group with written
21 confirmation within five days of the funds being deposited as specified above. Within five days
22 of the date that this Consent Judgment is approved by the Court, counsel for Rotary shall direct
23 its client trust account to issue a check payable to "The Chanler Group" in the amount of
24 \$38,600 and send it to the address found in Section 3.3.A below.

25 **3.5 Payment Procedures**

26 **3.5.A Issuance of Payments.**

27 All payments owed pursuant to Section 3.1 and 3.2 shall be delivered to the following
28 address:

1 The Chanler Group
2 Attn: Proposition 65 Controller
3 2560 Ninth Street
4 Parker Plaza, Suite 214
5 Berkeley, CA 94710

6 **3.3.B Court Approval; Reimbursement.**

7 If the Court does not approve the Consent Judgment, all funds tendered into any trust or
8 escrow account, or otherwise received by The Chanler Group from Rotary in settlement of this
9 Action, shall be refunded in full as required by Section 6 below.

10 **4. CLAIMS COVERED AND RELEASED**

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

12 In consideration of the promises and commitments contained herein, Plaintiff on behalf of
13 himself and in the public interest, hereby releases Rotary, its parents, subsidiaries, affiliated
14 entities that are under common ownership or control, directors, officers, employees, and attorneys
15 ("Releasees"), and each entity to whom they directly or indirectly distribute or sell Covered
16 Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees,
17 cooperative members, licensors, and licensees ("Downstream Defendant Releasees"), from all
18 claims for violations of Proposition 65 based on unwarned exposure to DEHP from the Covered
19 Products acquired, distributed or sold by Rotary prior to the Effective Date. Upon entry of this
20 Consent Judgment by the Court, going forward, Rotary's compliance with the terms of Section
21 2.1 of this Consent Judgment shall be deemed to constitute compliance with Proposition 65 with
22 respect to DEHP in the Covered Products.

23 **4.2 Plaintiff's Release of Additional Claims**

24 Plaintiff, in his individual capacity only and *not* in his representative capacity, also
25 provides a release to Rotary, its Releasees, and its Downstream Defendant Releasees which shall
26 be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
27 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
28 Brimer of any nature, character or kind, whether known or unknown, suspected or unsuspected,

1 arising out of alleged or actual exposures to the Listed Chemicals in the Covered Products or
2 Additional Products acquired, distributed, or sold by Rotary before the Effective Date. Upon
3 entry of this Consent Judgment by the Court, going forward, Rotary's compliance with the terms
4 of Section 2 of this Consent Judgment shall be deemed to constitute compliance with Proposition
5 65 with respect to Listed Chemicals in the Covered Products and Additional Products.

6 **4.3 Rotary's Release of Brimer**

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

13 **5. SEVERABILITY**

14 If, subsequent to the Court's approval of this Consent Judgment, any of the provisions
15 contained herein are held by a court to be unenforceable, the validity of the enforceable
16 provisions remaining shall not be adversely affected unless the Court finds that any unenforceable
17 provision is not severable from the remainder of the Consent Judgment.

18 **6. COURT APPROVAL**

19 This Consent Judgment is not effective until it is approved and entered by the Court and
20 shall be null and void if, for any reason, it is not approved and entered by Court within twelve
21 months of it being fully executed by the Parties, at which time, any funds being held in Trust or in
22 escrow for purposes of this agreement shall be fully reimbursed to Rotary.

23 **7. GOVERNING LAW**

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

1 and to the extent that, the Covered Products or Additional Products are so affected. Nothing in
2 this Consent Judgment shall be interpreted to relieve Rotary from any obligation to comply with
3 any other state or federal law.

4 **8. ENFORCEMENT**

5 Any Party may, by motion or application for an order to show cause before this Court,
6 enforce the terms and conditions contained in this Consent Judgment.

7 **9. NOTICES**

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

12 To Brimer:

13 The Chanler Group
14 Attn: Proposition 65 Coordinator
15 Parker Plaza
16 2560 Ninth Street, Suite 214
17 Berkeley, CA 94710

18 To Rotary:

19 Don Martin
20 Rotary Corporation
21 801 West Barnard Street
22 Glennville, GA 30427

23 *with a copy to*

24 Robert Falk
25 Morrison & Foerster LLP
26 425 Market Street, 32nd Floor
27 San Francisco, CA 94105

28 Any Party may modify the person and address to whom the notice is to be sent by sending each
other Party notice by mail and/or other verifiable form of written communication.

10. MODIFICATION

Except as provided in this Section, this Consent Judgment may be modified only by a
written agreement of the Parties and upon entry of a modified Consent Judgment by the Court

1 thereon or by the Court upon motion for good cause shown and entry of a modified Consent
2 Judgment by the Court.

3 **11. ADDITIONAL POST-EXECUTION ACTIVITIES**

4 Brimer agrees to comply with the reporting form requirements referenced in Health and
5 Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to California Health
6 & Safety Code § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of this
7 Consent Judgment. In furtherance of obtaining such approval, Brimer's counsel shall take the
8 lead in drafting the required motion and the Parties and their respective counsel agree to
9 mutually employ their best efforts to support the entry of this agreement as a Consent Judgment
10 and obtain approval of the Consent Judgment by the Court in a timely manner. For purposes of
11 this paragraph, "best efforts" shall include, at a minimum, cooperating on the drafting and filing
12 of any papers in support of the required motion for judicial approval. If any third party
13 objection to the noticed motion is filed, Brimer and Rotary shall work together to reply and
14 appear at any hearing before the Court. This provision is a material component of the Consent
15 Judgment and shall be treated as such in the event of a breach.

16 **12. ENTIRE AGREEMENT**

17 This Consent Judgment contains the sole and entire agreement and understanding of the
18 parties. No representations, oral or otherwise, express or implied, other than those contained
19 herein, have been made by any party hereto. No other agreements shall be deemed to exist or to
20 bind any of the parties.

21 **13. COUNTERPARTS, FACSIMILE SIGNATURES**

22 This Consent Judgment may be executed in counterparts and by facsimile or portable
23 document format (.pdf) signature, each of which shall be deemed an original, and all of which,
24 when taken together, shall be deemed to constitute one and the same document.

25
26
27
28

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

Each signatory to this Consent Judgment certifies that he or she is fully authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

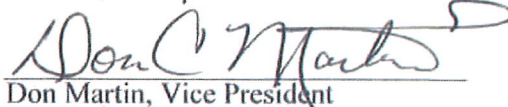
AGREED TO:

AGREED TO:

Date: July 31, 2015

Date: 7/31/15

By: 
Russell Brimer

By: 
Don Martin, Vice President
Rotary Corporation