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19 THE ASHLEY COLLECTION, INC.

20 SUPERIOR COURT OF THE STATE OF CALIFORNIA
21 FOR THE CITY AND COUNTY OF SAN FRANCISCO
22 UNLIMITED CIVIL JURISDICTION

23 RUSSELL BRIMER,
24 Plaintiff,
25 v.
26 ACCO BRANDS CORPORATION, *et al.*,
27 Defendants.

Case No. CGC-09-485784

**CONSENT TO JUDGMENT AS TO
DEFENDANT THE ASHLEY
COLLECTION, INC.**

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CONSENT TO JUDGMENT AS TO DEFENDANT THE ASHLEY COLLECTION, INC.

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and The Ashley Collection, Inc.**

3 This Consent To Judgment is entered into by and between Plaintiff Russell Brimer (hereinafter
4 "Brimer" or "Plaintiff") and Defendant The Ashley Collection, Inc. (hereinafter "Ashley" or
5 "Defendant"), with Brimer and Ashley collectively referred to as the "Parties."

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Ashley employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
13 Code § 25249.6 *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 Brimer alleges that Ashley has manufactured, distributed and/or sold in the State of California
16 vinyl coated measuring tapes containing lead on the exterior surface. Lead is listed pursuant to the
17 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 is referred to herein as the "Listed Chemical."

20 **1.5 Product Description**

21 The products that are covered by this Consent To Judgment are defined as follows: vinyl
22 coated measuring tapes containing the Listed Chemical on the exterior surface including, but not
23 limited to, the vinyl-coated measuring tape included with the *Protocol Car Accident Kit, #5932-2 (#6*
24 *58531 59322 7)*. All such items shall be referred to herein as the "Products."

25 **1.6 Notice of Violation**

26 On March 5, 2009, Brimer served Ashley and various public enforcement agencies with a
27 document entitled "60-Day Notice of Violation" that provided Ashley and such public enforcers with
28 notice that alleged that Ashley was in violation of California Health & Safety Code § 25249.6 for

1 failing to warn consumers and customers that the Products exposed users in California to lead. To the
2 best of the Parties' knowledge, no public enforcer has diligently prosecuted the allegations set forth in
3 the 60-Day Notice of Violation ("Notice").

4 **1.7 Complaint**

5 On March 5, 2009, Brimer, acting, in the interest of the general public in California, filed a
6 complaint in the Superior Court in and for the City and County of San Francisco, alleging violations
7 by various defendants of Health & Safety Code § 25249.6 based, *inter alia*, on the alleged exposures
8 to lead contained in vinyl coated paper fasteners (the "Action"). Ashley was not then named among
9 the defendants in the action, nor was Ashley named in the subsequently filed First Amended
10 Complaint ("FAC"); however, on or about October 9, 2009, Brimer sought leave to file a Second
11 Amended Complaint ("SAC") in the Action. On November 13, 2009, Brimer filed the SAC adding
12 Ashley as a defendant in the Action, and alleging that Ashley violated Health & Safety Code
13 § 25249.6 based on the alleged exposures to lead contained in the exterior surface of vinyl coated
14 measuring tapes manufactured, distributed and/or sold by Ashley.

15 **1.8 No Admission**

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

25 **1.9 Consent to Jurisdiction**

26 For purposes of this Consent To Judgment only, the parties stipulate that this Court has
27 jurisdiction over Ashley as to the allegations contained in the Complaint, that venue is proper in the

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1 City and County of San Francisco, and that this Court has jurisdiction to enter and enforce the
2 provisions of this Consent To Judgment pursuant to Code of Civil Procedure § 664.6.

3 **1.10 Effective Date**

4 For purposes of this Consent To Judgment, the term "Effective Date" shall mean April 20,
5 2010.

6 **2. INJUNCTIVE RELIEF: REFORMULATION**

7 **2.1 Reformulation Commitment**

8 Commencing on the Effective Date, Ashley shall not ship, sell or offer to be shipped for sale
9 in California any Product unless such Product is Lead Free. For purposes of this Consent To
10 Judgment, "Lead Free" shall mean products containing components that may be handled, touched or
11 mouthed by a consumer, and which components yield less than or equal to 100 parts per million by
12 weight of lead when analyzed pursuant to EPA testing methodologies, 3050B and 6010B, or
13 equivalent methods as may be allowed under Proposition 65.

14 **2.2 Requirements for Products Remaining in Inventory in California**

15 For Products distributed and sold before the Effective Date that are not Lead Free and remain
16 in inventory with retailers and distributors, Ashley must either provide Proposition 65 warnings or
17 request that the retailer or distributor return the unsold Products. To this end, Ashley represents and
18 warrants that it has contacted all retailers with locations in California that have offered the Products
19 for sale and instructed such retailers to remove the Products from their California stores and halt all
20 sales of the Products in California.

21 In the event Ashley discovers after the Effective Date that Products that are not Lead Free
22 continue to remain in inventory with retailers and/or distributors and that such Products are available
23 for sale in California through such retailers and/or distributors, Ashley must either provide
24 Proposition 65 warnings or request that the retailer or distributor return the unsold Products. Ashley
25 hereby agrees that, within thirty (30) days of discovering that Products that are not Lead Free continue
26 to remain in inventory and be offered for sale in California, Ashley will send a letter, via certified mail
27 with a copy to counsel for plaintiff, to each California retailer or distributor that is known or believed
28 to have any inventory of the Products. The letter shall explain, in detail, the retailer's or distributor's

1 duty to provide clear and reasonable warnings for the Products, in compliance with Proposition 65,
2 and either:

3 (a) include a sufficient number of warning stickers containing the following language:

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

6 with instructions that the stickers be placed on the product packaging for those Products that remain
7 on the sales floor of the retailer or are otherwise in inventory at the store or distribution facility. The
8 instructions shall advise retailers and distributors that warning stickers issued for Products shall be
9 prominently placed with such conspicuousness as compared with other words, statements, designs or
10 devices as to render it likely to be read and understood by an ordinary individual under customary
11 conditions before purchase; or

12 (b) request that the retailer or distributor return Products remaining in inventory in
13 California, if any, to Ashley, and state that Ashley will pay for shipping of the returned product.

14 As part of the instructions under either options (a) or (b), Ashley must specify the product
15 name, product number, and SKU number, if available, for each Product covered by the instruction
16 letter.

17 **WARNING:** This product contains lead, a chemical known to the
18 State of California to cause birth defects and other
reproductive harm.

19 **3. MONETARY PAYMENTS**

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

21 Pursuant to Health & Safety Code § 25249.7(b), Ashley shall pay \$2,000 in settlement of this
22 claim. This payment shall be apportioned in accordance with California Health & Safety Code
23 § 25192, with 75% of these funds remitted to the State of California's Office of Environmental Health
24 Hazard Assessment ("OEHHA") and the remaining 25% remitted to Brimer as provided by California
25 Health & Safety Code § 25249.12(d).

26 Ashley shall issue two separate checks for each of these payments pursuant to §25192: (a)
27 one check made payable to The Chanler Group in Trust for the State of California's Office of
28 Environmental Health Hazard Assessment (OEHHA) in the amount of \$1,000, representing 75%

1 of the total; and (b) one check to The Chanler Group in Trust for Brimer in the amount of \$500,
2 representing 25% of the total. Two separate 1099s shall be issued for the above payments: The
3 first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in
4 the amount of \$1,500. The second 1099 shall be issued in the amount of \$500 to Brimer, whose
5 address and tax identification number shall be furnished, upon execution of this Agreement. The
6 payment shall be made payable to The Chanler Group and shall be delivered within thirty (30) days
7 of the Effective Date, at the following address:

8 The Chanler Group
9 Attn: Proposition 65 Controller
10 2560 Ninth Street
11 Parker Plaza, Suite 214
12 Berkeley, CA 94710-2565

11 4. REIMBURSEMENT OF FEES AND COSTS

12 4.1 Attorney Fees and Costs

13 The parties acknowledge that Brimer and his counsel offered to resolve this dispute without
14 reaching terms on the amount of attorney fees and costs to be reimbursed to them, thereby leaving the
15 fee issue to be resolved after the material terms of the agreement had been settled. Ashley then
16 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
17 finalized. The parties then attempted to (and did) reach an accord on the compensation due to Brimer
18 and his counsel under general contract principles and the private attorney general doctrine codified at
19 California Code of Civil Procedure (CCP) § 1021.5, for all work performed through the mutual
20 execution of this agreement. Ashley shall reimburse Brimer and his counsel the total of \$20,000 for
21 fees and costs incurred as a result of investigating, bringing this matter to Ashley's attention, and
22 litigating and negotiating a settlement in the public interest. Ashley shall issue a separate 1099 for
23 fees and costs (EIN: 94-3171522) and shall make the check payable to "The Chanler Group" and shall
24 be delivered within thirty (30) days of the Effective Date, to the following address:

25 The Chanler Group
26 Attn: Proposition 65 Controller
27 2560 Ninth Street
28 Parker Plaza, Suite 214
Berkeley, CA 94710-2565

1 **5. RELEASE OF ALL CLAIMS**

2 **5.1 Brimer's Release of Ashley**

3 In further consideration of the promises and agreements herein contained, and for the
4 payments to be made pursuant to Sections 3 and 4, Brimer on behalf of himself, his past and current
5 agents, representatives, attorneys, successors, and/or assignees, and in the interest of the general
6 public, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
7 action and releases all claims including, without limitation, all actions, and causes of action, in law or
8 in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses
9 (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature
10 whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), that were
11 brought or could have been brought against Ashley or any of its parents, subsidiaries or affiliates, and
12 all of their customers, distributors, wholesalers, retailers, licensors, licensees, employees, officers,
13 agents, or any other person in the course of doing business, and the successors and assigns of any of
14 them, who may use, maintain, manufacture, distribute, advertise, market or sell Products, and the
15 officers, directors, managers, employees, members, shareholders, agents, insurers and representatives
16 of each of them (collectively "Releasees") in this matter. This release is limited to, but is intended to
17 be a full, final, and binding resolution of, those Claims that arise under Proposition 65, as against
18 Ashley, and the Releasees, as such Claims relate to Ashley's alleged failure to warn about exposures
19 to the Listed Chemical contained in the Products. Ashley's compliance with this Settlement
20 Agreement shall constitute compliance with Proposition 65 for Ashley and the Releasees with respect
21 to the Listed Chemical in such items after the Effective Date.

22 Brimer also, on behalf of himself and his agents, attorneys, representatives, successors and
23 assigns, in his individual capacity only and *not* in his representative capacity, provides a general
24 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
25 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
26 liabilities and demands of Brimer of any nature, character or kind, known or unknown, suspected or
27 unsuspected, arising out of the subject matter of this dispute. Brimer acknowledges that he is familiar
28 with Section 1542 of the California Civil Code, which provides as follows

1 A general release does not extend to claims which the creditor does not know or
2 suspect to exist in his or her favor at the time of executing the release, which if known
by him or her must have materially affected his settlement with the debtor.

3 Brimer, in his individual capacity only and *not* in his representative capacity, on behalf of
4 himself and his agents, attorneys, representatives, successors and assigns, expressly waives and
5 relinquishes any and all rights and benefits which he may have under, or which may be conferred on
6 him by the provisions of Section 1542 of the California Civil Code as well as under any other state or
7 federal statute or common law principle of similar effect, to the fullest extent that he may lawfully
8 waive such rights or benefits pertaining to the released matters. In furtherance of such intention, the
9 release hereby given shall be and remain in effect as a full and complete release notwithstanding the
10 discovery or existence of any such additional or different claims or facts arising out of the released
11 matters.

12 The Parties further understand and agree that this release shall not extend upstream to any
13 entities that manufactured the Products for Ashley or any component parts thereof or to any
14 distributors or suppliers who sold the Products or any component parts thereof to Ashley.

15 **5.2 Ashley's Release of Brimer**

16 Ashley waives any and all claims against Brimer, his attorneys, and other representatives for
17 any and all actions taken or statements made (or those alleged to have been taken or made) by Brimer
18 and his attorneys and other representatives in the course of investigating claims or otherwise seeking
19 enforcement of Proposition 65 against them in this matter with respect to the Products.

20 Ashley also provides a general release herein which shall be effective as a full and final accord
21 and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorney fees,
22 damages, losses, claims, liabilities and demands of Ashley of any nature, character or kind, known or
23 unknown, suspected or unsuspected, arising out of the subject matter of the Action. Ashley
24 acknowledges that it is familiar with Section 1542 of the California Civil Code, which provides as
25 follows:

26 A general release does not extend to claims which the creditor does not know or
27 suspect to exist in his or her favor at the time of executing the release, which if known
by him or her must have materially affected his settlement with the debtor.

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1 Ashley expressly waives and relinquishes any and all rights and benefits that it may have
2 under, or that may be conferred on it by, the provisions of Section 1542 of the California Civil Code
3 as well as under any other state or federal statute or common law principle of similar effect, to the
4 fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters. In
5 furtherance of such intention, the release hereby given shall be and remain in effect as a full and
6 complete release notwithstanding the discovery or existence of any such additional or different claims
7 or facts arising out of the released matters.

8 **6. COURT APPROVAL**

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

14 **7. SEVERABILITY**

15 If, subsequent to the execution of this Consent To Judgment, any of the provisions of this
16 Consent To Judgment are held by a court to be unenforceable, the validity of the enforceable
17 provisions remaining shall not be adversely affected.

18 **8. GOVERNING LAW**

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

25 **9. NOTICES**

26 Unless specified herein, all correspondence and notices required to be provided pursuant to
27 this Consent To Judgment shall be in writing and personally delivered or sent by: (i) first-class,

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1 registered or certified mail, return receipt requested; or (ii) overnight courier on any party by the other
2 party at the following addresses:

3 For Ashley:

4 Robert Goldy, CEO
5 600 W. 57th Street, 2nd Fl.
6 New York, NY 10019

6 with a copy to:

7 Lisa L. Halko
8 Greenberg Traurig LLP
9 1201 K Street, 11th Floor
10 Sacramento, CA 95814

9 For Brimer:

10 Proposition 65 Coordinator
11 The Chanler Group
12 2560 Ninth Street
13 Parker Plaza, Suite 214
14 Berkeley, CA 94710

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

15 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

22 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

23 The parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a noticed motion
24 is required to obtain judicial approval of this Consent To Judgment. In furtherance of obtaining such
25 approval, Brimer and Ashley and their respective counsel agree to mutually employ their best efforts
26 to support the entry of this agreement as a Consent To Judgment and obtain approval of the Consent
27 To Judgment by the Court in a timely manner.

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1 **13. MODIFICATION**

2 This Consent To Judgment may be modified only: (1) by written agreement of the parties and
3 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
4 any party and entry of a modified consent judgment by the Court. The Attorney General shall be
5 served with notice of any proposed modification to this Consent To Judgment at least fifteen days in
6 advance of its consideration by the Court.

7 **14. AUTHORIZATION**

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

10 **AGREED TO:**

11 Date: _____

12
13 By: _____
14 RUSSELL BRIMER

AGREED TO:

Date: April 20, 2010

By: 

15 Robert Goldy, CEO
16 THE ASHLEY COLLECTION, INC.

17 **APPROVED AS TO FORM:**

18 Date:
19
20 THE CHANLER GROUP

21 By: _____
22 Laurence D. Haveson
23 Attorneys for Plaintiffs
24 RUSSELL BRIMER

APPROVED AS TO FORM:

Date: 4/22/10
GREENBERG TRAUIG LLP

By: 

25 Sarah W. Asplin
26 Attorneys for Defendant
27 THE ASHLEY COLLECTION, INC.
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13. MODIFICATION

This Consent To Judgment may be modified only: (1) by written agreement of the parties and upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of any party and entry of a modified consent judgment by the Court. The Attorney General shall be served with notice of any proposed modification to this Consent To Judgment at least fifteen days in advance of its consideration by the Court.

14. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: 4.21.10

Date:

By: [Signature] RUSSELL BRIMER

By: Robert Goldy, CEO THE ASHLEY COLLECTION, INC.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Date: April 21, 2010 THE CHANLER GROUP

Date: GREENBERG TRAURIG LLP

By: [Signature] Laurence D. Haveson Attorneys for Plaintiffs RUSSELL BRIMER

By: Sarah W. Asplin Attorneys for Defendant THE ASHLEY COLLECTION, INC.