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CVS PHARMACY, INC.

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13 SUPERIOR COURT OF CALIFORNIA
14 COUNTY OF MARIN
15 UNLIMITED CIVIL JURISDICTION
16

17 RUSSELL BRIMER,

18 Plaintiff,

19 vs.

20 CVS PHARMACY, INC.; *et al.*,

21 Defendants.
22

Case No. CIV1001430

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

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and CVS Pharmacy, Inc.**

3 This Stipulation and [Proposed] Order Re: Consent Judgment (“Consent Judgment” or
4 “Settlement”) is entered into by and between plaintiff Russell Brimer (“Brimer” or “Plaintiff”) and
5 defendant CVS Pharmacy, Inc. (“CVS” or “Defendant”), with Plaintiff and Defendant collectively
6 referred to hereinafter as the “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendants**

12 CVS 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 &
14 Safety Code § 25249.6 *et seq.* (“Proposition 65”). CVS Caremark Corporation is the parent
15 company of CVS and did not manufacture, supply, or sell the Products as defined in Section 1.5.
16 CVS Caremark Corporation shall be dismissed without prejudice upon entry of this Consent
17 Judgment.

18 **1.4 General Allegations**

19 Brimer alleges that Defendant distributed and/or sold certain flashlights containing lead in
20 the State of California without the requisite health hazard warnings. Lead is known to cause birth
21 defects and other reproductive harm and is listed by its chemical nomenclatures pursuant to
22 Proposition 65. Lead listed by the State of California under Proposition 65 shall be referred to
23 hereinafter as the “Listed Chemical.”

24 **1.5 Product Description**

25 The products that are covered by this Consent Judgment are flashlights with accessible
26 components containing lead, specifically, and limited to, *Round The House 2-pk Torchlight SKU*
27 *#463435 (#0 50428 13209 8)*, which CVS manufactured, distributed, and/or sold in the State of
28 California. These flashlights containing lead are referred to hereinafter as the “Products.”

1 **1.6 Notice of Violation**

2 On September 30, 2009, Brimer served Defendant and the Office of the California Attorney
3 General, all California counties' District Attorneys and all City Attorneys of California cities with
4 populations exceeding 750,000 (collectively, "Public Enforcers") with a 60-Day Notice of
5 Violation ("Notice") that alleged violations of Proposition 65 in connection with the sale of the
6 Products containing the Listed Chemical. To the best of the Parties' knowledge, no Public
7 Enforcer has prosecuted any of the allegations set forth in the Notice.

8 **1.7 Complaint**

9 On March 19, 2010, Brimer filed a complaint ("Complaint") in the Superior Court for the
10 County of Marin against Defendant alleging violations of Proposition 65 based on Defendant's
11 failure to give clear and reasonable warnings before allegedly causing exposures to the Listed
12 Chemical contained in the Products.

13 **1.8 No Admission**

14 Defendant denies the material, factual, and legal allegations contained in the Notice and
15 Complaint, and maintains that all of the products that it has sold and distributed in California,
16 including the Products, have been, and are, in compliance with all laws, including, without
17 limitation, Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by
18 Defendant of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance
19 with this Consent Judgment constitute or be construed as an admission by Defendant of any fact,
20 finding, conclusion, issue of law, or violation of law, such being specifically denied by Defendant.
21 In order to avoid further litigation costs and attorneys' fees, Defendant chose to resolve this matter
22 with Brimer through settlement as set forth herein. However, this Section shall not diminish or
23 otherwise affect Defendant's obligations, responsibilities, and duties under this Consent Judgment.

24 **1.9 Consent to Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper in
27 the County of Marin and that this Court has jurisdiction to enter and enforce the provisions of this
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1 Consent Judgment as a full and binding resolution of all claims which were or could have been
2 raised in the Complaint against Defendant based on the facts alleged therein and in the Notice.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term "Effective Date" shall mean June 1, 2011.

5 **2. INJUNCTIVE RELIEF: REFORMULATION**

6 Except for those Products that were received by CVS before September 30, 2010, after the
7 Effective Date, CVS shall only distribute and/or sell, or cause to be distributed, and/or sold, Products
8 in California with vinyl grips that contain less than or equal to 100 ppm of lead when analyzed
9 pursuant to Environmental Protection Agency ("EPA") testing methodologies 3050B or equivalent
10 methods authorized under Proposition 65.

11 **3. PAYMENTS PURSUANT HEALTH & SAFETY CODE § 25249.7(b)**

12 In settlement of all the claims referred to in this Consent Judgment against it, CVS shall
13 make payments and receive credits totaling \$15,000 in civil penalties, as follows:

14 **3.1** CVS shall make an initial payment of \$8,000 to be apportioned in accordance with
15 Health & Safety Code § 25249.12 (c)(1) & (d), with 75% of these funds remitted to the State of
16 California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining
17 25% of these penalty monies remitted to Brimer as provided by Health & Safety Code
18 § 25249.12(d). CVS shall issue two checks for the penalty payment: (a) one check made payable
19 to "The Chanler Group in Trust for OEHHA" in the amount of \$6,000, representing 75% of the
20 total penalty, and (b) one check to "The Chanler Group in Trust for Russell Brimer" in the amount
21 of \$2,000, representing 25% of the total penalty. Two 1099 forms shall be issued for the above
22 payments to: (a) Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento,
23 CA 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose address and tax identification
24 number shall be furnished, upon request, at least five (5) calendar days before payment is due. The
25 payments shall be delivered on or before June 15, 2011, at the address set forth in Section 3.3.

26 **3.2** CVS shall receive an automatic credit of \$7,000, for its commitment to reformulate its
27 Products pursuant to Section 2, above.

28 **3.3** All payments made pursuant to this Section, shall be delivered to Brimer's counsel at

1 the following address:

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

6 **4. ATTORNEYS' FEES AND COSTS**

7 **4.1 Reimbursement of Plaintiff's Attorneys' Fees and Costs**

8 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
9 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
10 issue to be resolved after the material terms of the agreement had been settled. CVS then expressed
11 its preference to resolve the fee and cost issue shortly after the other settlement terms were
12 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to
13 Brimer and his counsel under general contract principles and the private attorney general doctrine
14 codified at California Code of Civil Procedure ("CCP") § 1021.5, for all work performed through
15 the Court approval of this agreement. CVS shall reimburse Brimer and his counsel for fees and
16 costs incurred as a result of investigating, bringing this matter to CVS' attention, litigating and
17 negotiating a settlement in the public interest, drafting and filing of the motion to approve papers,
18 fulfilling the reporting requirements referenced in Health & Safety Code § 25249.7(f),
19 corresponding with opposing counsel, responding to any third party objections, filing a notice of
20 entry of approval, and appearing before the Court in relation to the approval process. CVS shall
21 pay \$33,500 for all attorneys' fees and costs. Such fees and costs are exclusive of fees and costs
22 that may be incurred in the event of an appeal. CVS shall issue a separate 1099 form for fees and
23 costs paid to The Chanler Group (EIN: 94-3171522), shall make its check payable to "The Chanler
24 Group" and shall deliver payment to Brimer's counsel on or before June 15, 2011, at the following
25 address:

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

1 **5. RELEASE OF ALL CLAIMS**

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

3 In further consideration of the promises and agreements herein contained, and for the
4 payments to be made pursuant to Sections 3.1 and 4.1 of this Consent Judgment, Brimer on behalf
5 of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, and
6 in the interest of the general public, hereby waives all rights to institute or participate in, directly or
7 indirectly, any form of legal action and releases all claims including, without limitation, all actions
8 and causes of action in law or in equity, suits, liabilities, demands, obligations, damages, costs,
9 fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees,
10 and attorney's fees) of any nature whatsoever (collectively "Claims"), against CVS and each of its
11 distributors, wholesalers, suppliers, licensors, licensees, auctioneers, retailers, franchisees, dealers,
12 customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, and their
13 respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and
14 sister and parent entities (collectively "Releasees"). This release is limited to those Claims that
15 arise under Proposition 65 as such Claims relate to CVS' alleged failure to warn about exposures
16 to, or identification of, the Listed Chemical contained in the Products.

17 **5.2 CVS' Release of Brimer**

18 CVS waives any and all claims against Brimer, his attorneys, and other representatives for
19 any and all actions taken or statements made (or those that could have been taken or made) by
20 Brimer and his attorneys and other representatives, whether in the course of investigating Claims or
21 otherwise seeking enforcement of Proposition 65 against them in this matter, and/or with respect to
22 the Products.

23 **5. SEVERABILITY**

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

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1 **6. ATTORNEY'S FEES**

2 In the event that, after the execution of this proposed Consent Judgment, (1) a dispute arises
3 with respect to any provision of this proposed Consent Judgment, or (2) either party takes
4 reasonable and necessary steps to enforce the terms of this Consent Judgment, the prevailing party
5 in such dispute or enforcement action shall be entitled to reasonable attorneys' fees and costs.

6 **7. GOVERNING LAW**

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

13 **8. NOTICES**

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

18 To CVS:

19 Karen Feisthamel, Esq.
20 Senior Legal Counsel
21 CVS Pharmacy, Inc.
22 One CVS Drive
23 Woonsocket, Rhode Island 02895

18 To Brimer:

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

22 with a copy to:

23 John E. Dittoe, Esq.
24 Reed Smith, LLP
25 101 Second Street, Suite 1800
26 San Francisco, CA 94105

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

1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

2 This Consent Judgment may be executed in counterparts and by facsimile or by portable
3 document format (pdf) signature, each of which shall be deemed an original, and all of which,
4 when taken together, shall constitute one and the same document. A facsimile or pdf signature
5 shall be as valid as the original.

6 **10. ADDITIONAL POST EXECUTION ACTIVITIES**

7 Brimer agrees to comply with the reporting form requirements referenced in California
8 Health & Safety Code § 25249.7(f)(1). The Parties further acknowledge that, pursuant to Health &
9 Safety Code § 25249.7(f)(4), a Motion to Approve the Consent Judgment (“Motion”) is required to
10 obtain judicial approval of this Settlement. In furtherance of obtaining such approval, Brimer, CVS
11 and their respective counsel agree to mutually employ their best efforts to support the entry of this
12 agreement as a Consent Judgment and obtain judicial approval of the same in a timely manner. For
13 the purposes of this Section, “best efforts” shall mean, at minimum, cooperating in the drafting and
14 filing of the Motion for judicial approval of the Agreement.

15 **11. MODIFICATION**

16 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
17 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion
18 of any party and entry of a modified consent judgment by the Court. The Attorney General shall be
19 served with notice of any proposed modification to this Consent Judgment at least fifteen (15) days
20 in advance of its consideration by the Court. Brimer shall be entitled to his reasonable fees and
21 costs incurred in the modification process under CCP § 1021.5 if CVS seeks to modify the terms of
22 this Consent Judgment.

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1 **13. AUTHORIZATION**


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

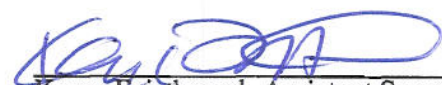
5 **AGREED TO:**

AGREED TO:

6 Date: 5-25-11

Date: 5-26-2011

7
8 By: 
9 RUSSELL BRIMER

By: 
Karen Feisthamel, Assistant Secretary/
Senior Legal Counsel
CVS PHARMACY, INC.

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12 **IT IS SO ORDERED.**

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14 Date: _____

Judge of the Superior Court

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