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11 BROOKSTONE, INC.;
BROOKSTONE COMPANY, INC.
12

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

16 RUSSELL BRIMER,

17 Plaintiff,

18 v.

19 BROOKSTONE, INC.; BROOKSTONE
20 COMPANY, INC., *et al.*,

21 Defendants.
22
23
24
25
26
27
28

Case No. 110 CV 172362

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code §25249.6

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer, Brookstone, Inc. and Brookstone Company, Inc.**

3 This Consent Judgment is entered into by and between Russell Brimer (hereinafter “Brimer”
4 or “Plaintiff”) and Brookstone, Inc. and Brookstone Company, Inc. (hereinafter collectively
5 “Brookstone” or “Defendant”), with Brimer and Brookstone 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 Defendants**

11 Brookstone 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 Brookstone has manufactured, distributed and/or sold in the State of
16 California luggage tags that contain lead without providing Proposition 65 warnings. Lead is listed
17 pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects and
18 other reproductive harm. Lead is referred to herein as the “Listed Chemical.”

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are defined as follows: luggage tags
21 containing the Listed Chemical such as, but not limited to, *Brookstone Luggage Tags, Orange,*
22 *#598219 (#8 83594 01382 9)*. All such luggage tags containing the Listed Chemical are referred to
23 hereinafter as the “Products.”

24 **1.6 Notice of Violation**

25 On or about February 12, 2010, Brimer served Brookstone and various public enforcement
26 agencies with documents entitled “60-Day Notice of Violation” (“Notice”) that provided Brookstone
27 and public enforcers with notice of alleged violations of Proposition 65 for failing to warn consumers
28

1 that the Products exposed users in California to the Listed Chemical. To the best of the parties'
2 knowledge, no public enforcer has diligently prosecuted the allegations set forth in the Notices.

3 **1.7 Complaint**

4 On or about May 20, 2010, Brimer, who was and is acting in the interest of the general public
5 in California, in the Superior Court in and for the County of Santa Clara, filed a complaint against
6 Brookstone alleging violations of Proposition 65 based on the alleged exposures to the Listed
7 Chemical contained in the Products manufactured, distributed and/or offered for sale in California by
8 Brookstone ("Complaint").

9 **1.8 No Admission**

10 This Consent Judgment resolves claims that are denied and disputed by Defendant. The
11 Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
12 between the Parties for the purpose of avoiding prolonged litigation. Brookstone denies the material,
13 factual and legal allegations contained in Brimer's Notice and Complaint and maintains that all
14 Products that it has manufactured, sold and/or distributed in California have been and are in
15 compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by
16 Brookstone of any fact, finding, issue of law, or violation of law; nor shall compliance with this
17 Consent Judgment constitute or be construed as an admission by Brookstone of any fact, finding,
18 conclusion, issue of law, or violation of law, such being specifically denied by Brookstone.
19 However, this section shall not diminish or otherwise affect Brookstone's obligations,
20 responsibilities, or duties under this Consent Judgment.

21 **1.9 Consent to Jurisdiction**

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

26 **1.10 Effective Date**

27 For purposes of this Consent Judgment, the term "Effective Date" shall mean August 5, 2010.
28

1 **2. INJUNCTIVE RELIEF: REFORMULATION**

2 **2.1 Reformulation Commitment**

3 Brookstone hereby commits that one hundred percent (100%) of the Products that it
4 manufactures, sells or ships after the Effective Date for sale in California, shall contain less than or
5 equal to 1.0 microgram of lead when using a wipe test pursuant to NIOSH Test Method 9100, and
6 less than 100 parts per million (“ppm”) of the Listed Chemical when analyzed pursuant to
7 Environmental Protection Agency (“EPA”) testing methodologies 3050B and 6010B or any other
8 method allowed by a federal or state agency to assess the content of lead in a consumer product.

9 **3. MONETARY PAYMENTS**

10 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

11 **3.1.1.** In settlement of all claims related to the Products and Listed Chemical referred
12 to in the Complaint, and this Consent Judgment, pursuant to Health & Safety Code § 25249.7(b),
13 Brookstone shall pay civil penalties of \$ 4,000 (“Civil Penalty”).

14 Brookstone shall issue two separate checks for the Civil Penalty payment pursuant to Health
15 & Safety Code § 25192: (a) one check made payable to “The Chanler Group in Trust For The State
16 of California’s Office of Environmental Health Hazard Assessment (OEHHA)” in the amount of
17 \$3,000, representing 75% of the total penalty; and (b) one check to “The Chanler Group in Trust for
18 Russell Brimer” in the amount of \$1,000, representing 25% of the total penalty. Two separate
19 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814
20 (EIN: 68-0284486); and (b) Russell Brimer, whose information shall be provided five (5) calendar
21 days before the payment is due.

22 Payment shall be delivered to Brimer’s counsel on or before August 5, 2010 at the following
23 address:

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

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

2 **4.1 Attorney Fees and Costs.**

3 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
4 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the fee
5 issue to be resolved after the material terms of the agreement had been settled. Brookstone then
6 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
7 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to Brimer
8 and his counsel under general contract principles and the private attorney general doctrine codified at
9 California Code of Civil Procedure (C.C.P.) § 1021.5, for all work performed through the mutual
10 execution of this agreement. Under these legal principles, Brookstone shall reimburse Brimer's
11 counsel for fees and costs, incurred as a result of investigating, bringing this matter to Brookstone's
12 attention, negotiating a settlement in the public interest, and obtaining court approval of the
13 settlement. Brookstone shall pay Brimer and his counsel \$ 45,800 for all attorneys' fees, expert and
14 investigation fees, and related costs. The payment shall be issued in a third separate check made
15 payable to "The Chanler Group" and shall be delivered on or before August 5, 2010, at the following
16 address:

17 The Chanler Group
18 Attn: Proposition 65 Controller
19 2560 Ninth Street
20 Parker Plaza, Suite 214
21 Berkeley, CA 94710

22 Brookstone shall issue a separate 1099 for fees and cost paid in the amount of \$ 45,800 to The
23 Chanler Group, 2560 Ninth Street, Parker Plaza, Suite 214, Berkeley, California, 94710 (EIN: 20-
24 3929984).

25 **5. RELEASE OF ALL CLAIMS**

26 **5.1 Brimer's Release of Brookstone**

27 In further consideration of the promises and agreements herein contained, and for the
28 payments to be made pursuant to Sections 3 and 4 above, Brimer on behalf of himself and in his
representative capacity, his past and current agents, representatives, attorneys, successors, and/or

1 assignees, and in the interest of the general public, hereby waives all rights to institute or participate
2 in, directly or indirectly, any form of legal action and releases all claims, including, without
3 limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
4 damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees,
5 expert fees, and attorney's fees) of any nature whatsoever, whether known or unknown, fixed or
6 contingent (collectively "claims"), against Brookstone and each of its wholesalers, licensors,
7 licensees, import partners, auctioneers, retailers, distributors, franchisees, dealers, customers, owners,
8 purchasers, users, parent companies, predecessors, successors, corporate affiliates, subsidiaries, and
9 their respective officers, directors, attorneys, representatives, shareholders, agents, and employees,
10 (collectively "Releasees") that arise under Proposition 65 or any other statutory or common law
11 claims that could have been asserted in the public interest, as such claims relate to Brookstone's
12 and/or the Releasees' alleged failure to warn about exposures to the Listed Chemical contained in the
13 Products. Brookstone's compliance with this Consent Judgment shall constitute compliance with
14 Proposition 65 for Brookstone and its Releasees with respect to the Listed Chemical in the Products
15 after the Effective Date.

16 Brimer also, on behalf of himself, his past and current successors, and/or assignees and *not* in
17 his representative capacity, provides a general release herein which shall be effective as a full and
18 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
19 attorneys' fees, damages, losses, claims, liabilities and demands of any nature, character or kind,
20 known or unknown, suspected or unsuspected, against Defendant and its Releasees arising under
21 Proposition 65, as such claims relate to Defendant and its Releasees' alleged failure to warn about
22 exposures to or identification of any chemicals listed under Proposition 65 contained in any products
23 sold by Defendant or its Releasees. Brimer acknowledges that he is familiar with Section 1542 of the
24 California Civil Code, which provides as follows:

25 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
26 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS
27 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
28 KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS
SETTLEMENT WITH THE DEBTOR.

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

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

10 Brookstone, on behalf of itself and its Releasees, waives any and all claims against Brimer,
11 his attorneys, and other representatives for any and all actions taken by Brimer and his attorneys and
12 other representatives, whether in the course of investigating claims or otherwise seeking enforcement
13 of Proposition 65 against them in this matter, and/or with respect to the Products.

14 Defendant also provides a general release herein which shall be effective as a full and final
15 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
16 attorneys' fees, damages, losses, claims, liabilities and demands of Defendant of any nature, character
17 or kind, known or unknown, suspected or unsuspected, arising out of the subject matter of the Action.
18 Defendant acknowledges that it is familiar with Section 1542 of the California Civil Code, which
19 provides as follows:

20 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
21 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS
22 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
23 KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS
24 SETTLEMENT WITH THE DEBTOR.

25 Defendant expressly waives and relinquishes any and all rights and benefits which it may
26 have under, or which may be conferred on it by the provisions of Section 1542 of the California Civil
27 Code as well as under any other state or federal statute or common law principle of similar effect, to
28 the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters.
In furtherance of such intention, the release hereby given shall be and remain in effect as a full and

1 complete release notwithstanding the discovery or existence of any such additional or different claims
2 or facts arising out of the released matters.

3 **6. COURT APPROVAL**

4 This Consent Judgment is not effective until it is approved and entered by the Court and shall
5 be null and void if, for any reason, it is not approved and entered by the Court within nine months
6 after it has been fully executed by all parties, in which event any monies that have been provided to
7 Brimer, and/or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within
8 fifteen (15) days after receiving written notice from Brookstone that the nine month period has
9 expired.

10 **7. SEVERABILITY**

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

14 **8. GOVERNING LAW**

15 The terms of this Consent Judgment shall be governed by the laws of the State of California
16 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is
17 otherwise rendered inapplicable by reason of law generally, or as to the Listed Chemical or Products
18 specifically, then Brookstone may provide written notice to Brimer of any asserted change in the law,
19 and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the
20 extent that, the Products are so affected.

21 **9. NOTICES**

22 Unless specified herein, all correspondence and notices required to be provided pursuant to
23 this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
24 registered or certified mail, return receipt requested; or (ii) overnight courier on any party by the
25 other party at the following addresses:
26
27
28

1 For Brookstone:

2 General Counsel
3 Brookstone
4 One Innovation Way
5 Merrimack, NH 03054

6 With a copy to:

7 J. Robert Maxwell, Esq.
8 Rogers Joseph O'Donnell
9 311 California Street, 10th Floor
10 San Francisco, CA 94104

11 For Brimer:

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

17 Any party, from time to time, may specify in writing to the other party a change of address to
18 which all notices and other communications shall be sent. The Parties intend and agree that this
19 Consent Judgment shall be given full effect for purposes of precluding claims regarding the Listed
20 Chemical contained in the Products against Brookstone and its Releasees under Proposition 65 as
21 covered under the release in Section 5 of this Consent Judgment.

22 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

12. ADDITIONAL POST EXECUTION ACTIVITIES

The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed motion
is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such
approval, Brimer and Brookstone (and their respective counsel) agree to mutually employ their best

1 efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the
2 Consent Judgment by the Court in a timely manner. Brimer shall prepare and file all documents
3 necessary to obtain court approval of this Consent Judgment. For purposes of this paragraph, best
4 efforts shall include, at a minimum, cooperating on the drafting and filing any papers in support of
5 the required motion for judicial approval.

6 **13. MODIFICATION**

7 This Consent Judgment may be modified only: (1) by written agreement of the parties and
8 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
9 any party and entry of a modified consent judgment by the Court.

10 **14. AUTHORIZATION**

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

13
14 **AGREED TO:**

15 Date: 7-20-10

16
17 By:  _____
18 Plaintiff

RUSSELL BRIMER

AGREED TO:

Date: _____

By: _____

_____,
BROOKSTONE, INC.; BROOKSTONE
COMPANY, INC.

19
20 **IT IS SO ORDERED.**

21
22 Date: _____

JUDGE OF THE SUPERIOR COURT

1 efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the
2 Consent Judgment by the Court in a timely manner. Brimer shall prepare and file all documents
3 necessary to obtain court approval of this Consent Judgment. For purposes of this paragraph, best
4 efforts shall include, at a minimum, cooperating on the drafting and filing any papers in support of
5 the required motion for judicial approval.

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8 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
9 any party and entry of a modified consent judgment by the Court.

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

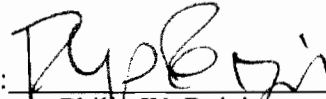
13
14 **AGREED TO:**

15 Date: _____

16
17 By: _____
18 Plaintiff
19 RUSSELL BRIMER

AGREED TO:

20 Date: July 19, 2010
21 BROOKSTONE, INC.
22 BROOKSTONE COMPANY, INC.

23 By: 
24 Name: Philip W. Roizin
25 Title: Executive Vice President, Operations and
26 Chief Financial Officer



27 **IT IS SO ORDERED.**

28 Date: _____

JUDGE OF THE SUPERIOR COURT