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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA - UNLIMITED JURISDICTION

RUSSELL BRIMER, Plaintiff, v. PICNIC TIME, INC.; and DOES 1 through 150, Defendants.	Case No. RG10527198 **CONSENT JUDGMENT**

DOCUMENT PREPARED ON RECYCLED PAPER

1. INTRODUCTION

1.1 The Parties

This Consent Judgment is entered into by and between Plaintiff Russell Brimer ("Brimer" or "Plaintiff") and Defendant Picnic Time, Inc. ("Picnic Time" or "Defendant"), with Plaintiff and Picnic Time collectively referred to as the "Parties."

1.2 Plaintiff

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

1.3 Defendant

Picnic Time employs 10 or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6 et seq. (Proposition 65).

1.4 General Allegations

Brimer alleges that Picnic Time has manufactured, distributed and/or sold, in the State of California, tote bag products that expose users to lead, without first providing "clear and reasonable warning" under Proposition 65. Lead is listed as a reproductive and developmental toxicant pursuant to Proposition 65. In addition, di(2-ethylhexyl)phthalate ("DEHP") and other phthalates such as di-n-butyl phthalate ("DBP") are listed as reproductive toxicants under Proposition 65. Lead, DEHP and DBP shall be collectively referred to herein as the "Listed Chemicals."

1.5 Product Description

The products that are covered by this Consent Judgment are defined as all Tote bags and picnic baskets, including, but not limited to, the product identified as the *Picnic Time Topanga Natural Insulated Tote #620-00-701* and the *Picnic Time Moka Collection Pioneer Picnic Basket #348-76-777,* manufactured, imported, distributed and/or sold in California by Picnic Time which contain one or more of the Listed Chemicals (hereinafter referred to as the "Products").

1.6 **Notice of Violation**

On March 19, 2010, and October __, 2010, Brimer served Picnic Time and various public enforcement agencies with a document entitled "60-Day Notice of Violation" that provided public enforcers and Picnic Time with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn consumers that the Products that Picnic Time distributed and/or sold exposed users in California to Listed Chemicals (the "Notices"). No public enforcer has diligently prosecuted the allegations set forth in the Notices.

1.7 **Complaint**

On July 23, 2010, Brimer, acting in the interest of the general public in California, filed a complaint in the Superior Court for the County of Alameda, alleging violations of Health & Safety Code § 25249.6 based on the alleged exposures to lead contained in tote bags distributed and/or sold by Picnic Time (the "Complaint"). This action shall hereinafter be referred to as the "Action." Upon the Court's entry of this Consent Judgment, the Complaint in the Action shall be deemed amended to include allegations that the Products herein described contained Listed Chemicals.

1.8 **No Admission**

This Consent Judgment resolves claims that are denied and disputed by Picnic Time. The Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all claims between the Parties for the purpose of avoiding prolonged litigation. Picnic Time denies the material factual and legal allegations contained in the Notices and Complaint and maintains that all Products it has manufactured, distributed and/or sold in California have been and are in compliance with all applicable laws. Nothing in this Consent Judgment shall be construed as an admission by Picnic Time of any fact, finding, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission by Picnic Time of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Picnic Time. However, this Section shall not diminish or otherwise affect Picnic Time's obligations, responsibilities, and duties under this Consent Judgment.

1.9 **Consent to Jurisdiction**

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

2. INJUNCTIVE RELIEF: REFORMULATION

Commencing on November 30, 2010 (the "Effective Date"), Picnic Time shall not have manufactured or shipped to it Products for sale in California unless such Products are Lead Free and Phthalate Free, as further defined below. For purposes of this Consent Judgment, "Lead Free" Products shall mean Products containing components that may be handled, touched or mouthed by a consumer, and which components yield less than 1.0 microgram of lead when using a wipe test pursuant to NIOSH Test Method 9100, and yield less than 100 parts per million ("ppm") lead when analyzed pursuant to EPA testing methodologies 3050B and 6010B, or equivalent methodologies utilized by federal or state agencies for the purpose of determining lead content in a solid substance. Additionally, for purposes of this Consent Judgment, "Phthalate Free" shall mean Products containing less than or equal to 1,000 ppm of DEHP and DBP, when analyzed pursuant to any testing methodology selected by Picnic Time that is acceptable to state or federal government agencies in determining compliance with phthalate standards. Products that are Lead Free and Phthalate Free are referred to hereinafter as "Reformulated Products."

Picnic Time hereby commits that 100% of the Products that it will have manufactured or shipped to it for sale in California after the Effective Date shall be both Lead Free and Phthalate Free.

3. MONETARY PAYMENTS

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

3.1.1 In settlement of all claims related to the Products and Listed Chemical referred to in the Complaint and this Consent Judgment, pursuant to Health & Safety Code § 25249.7(b), Picnic Time shall pay $4,000 in civil penalties.

3.1.2 Civil penalties are to be apportioned in accordance with California Health & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Brimer as provided by California Health & Safety Code §25249.12(d). Picnic Time shall issue two separate checks for the penalty payment: (a) one check made payable to "The Chanler Group in Trust for OEHHA" in an amount representing 75% of the total penalty; and (b) one check to "The Chanler Group in Trust for Brimer" in an amount representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose information shall be provided five (5) calendar days before the payment is due.

3.1.3 Payment shall be delivered to Brimer's counsel at the following address on or before October 26, 2010:

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

4. REIMBURSEMENT OF FEES AND COSTS

4.1 Attorney Fees and Costs

4.1.1 The parties reached an accord on the compensation due to Brimer and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure (CCP) §1021.5, for all work performed through the mutual execution of this agreement and approval by the trial court, excluding any fees on appeal. Picnic Time shall pay Brimer and his counsel a total of $52,000 for fees and costs incurred as a result of investigating, bringing this matter to Picnic Time's attention, and litigating and negotiating a settlement in the public interest.

4.1.2 The payment shall be issued in a third separate check made payable to "The Chanler Group" and shall be delivered to Brimer's counsel at the following address on or before October 26, 2010:

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

5. CLAIMS COVERED AND RELEASE

5.1 Brimer's Release of Defendant and its Chain of Distribution

5.1.1 This Consent Judgment is a full, final, and binding resolution between Brimer, acting on behalf of himself and in the interest of the general public, and Picnic Time, its owners, subsidiaries, affiliates, sister and related companies, employees, shareholders, directors, insurers, attorneys, successors, and assigns ("Defendant Releasees"), and all entities to whom they directly or indirectly distribute or sell Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Downstream Defendant Releasees") of any violation of Proposition 65 or any statutory or common law claim that has been or could have been asserted against Defendant Releasees and Downstream Defendant Releasees individually or in the public interest regarding the failure to warn about exposure to Listed Chemicals arising in connection with Products manufactured and/or shipped to Defendant prior to the Effective Date even if sold by Defendant Releasees or Downstream Defendant Releasees after the Effective Date. Defendant's compliance with this Consent Judgment shall constitute compliance with Proposition 65 with respect to Listed Chemicals in the Products for both Defendant Releasees and Downstream Defendant Releasees.

5.1.2 Brimer on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives with respect to Products all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"),

against Defendant Releasees and Downstream Defendant Releasees that arise under Proposition 65 or any other statutory or common law claims that were or could have been asserted in the public interest, as such claims relate to Defendant Releasees' and Downstream Defendant Releasees' alleged failure to warn about exposures to Listed Chemicals contained in the Products.

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

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

Brimer, in his individual capacity only and *not* in his representative capacity, and on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees expressly waives and relinquishes any and all rights and benefits which he may have under, or which may be conferred on him by the provisions of Section 1542 of the California Civil Code as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that he 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 complete release notwithstanding the discovery or existence of any such additional or different claims or facts arising out of the released matters.

5.1.4 Upon court approval of the Consent Judgment, the Parties waive their respective rights to a hearing or trial on the allegations of the Complaint.

5.1.5 The Parties further understand and agree that, except as provided for above, this release shall not extend upstream to any third parties that manufactured the Products or any component parts thereof, or any distributors or suppliers who sold the Products or any component parts thereof to Picnic Time.

5.2 **Picnic Time's Release of Brimer**

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

5.2.2 Picnic Time also provides a general release herein which shall be effective as a full and final accord and satisfaction, and as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Picnic Time of any nature, character or kind, known or unknown, suspected or unsuspected. Picnic Time acknowledges that it is familiar with Section 1542 of the California Civil Code, which provides as follows:

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

Picnic Time expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it by the provisions of Section 1542 of the California Civil Code as well as under any other state or federal statute or common law principle of similar effect, to 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 complete release notwithstanding the discovery or existence of any additional or different claims or facts arising out of the released matters.

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6. SEVERABILITY

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

7. COURT APPROVAL

This Consent Judgment is not effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved and entered by the Court within nine months after it has been fully executed by all Parties. In the event this consent judgment is (a) not entered by this Court within nine months (or thereafter) for any reason whatsoever, or (b) is entered by the Court and subsequently overturned by any appellate court, any monies that have been provided to Brimer, or his counsel pursuant to Section 3 and/or Section 4 above, together with interest at the prevailing Federal Funds Rate accruing from the date of payment by Picnic Time, shall be refunded within fifteen (15) days after receiving written demand from Picnic Time for return of such funds.

8. GOVERNING LAW

The terms of this Consent Judgment shall be governed by the laws of the State of California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Listed Chemical and/or the Products, then Picnic Time shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

9. NOTICES

When any Party is entitled to receive any notice under this Consent Judgment, the notice shall be sent by certified mail and electronic mail to the person(s) identified below:

To Picnic Time:

Mario Tagliati
President
Picnic Time, Inc.
5131 Maureen Lane
Moorpark, CA 93021

With copy to:

James Robert Maxwell, Esq.
Rogers Joseph O'Donnell
311 California Street
San Francisco, CA 94104

To Brimer:

The Chanler Group
Attn: Proposition 65 Coodinator
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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

10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)

Brimer agrees to comply with the reporting form requirements referenced in California Health & Safety Code §25249.7(f) and to file a motion for approval of this Consent Judgment.

11. MODIFICATION

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

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, Picnic Time and their respective counsel agree to mutually employ their best efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely manner.

13. ENTIRE AGREEMENT

This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and supersedes any and all prior discussions, negotiations, commitments, and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the parties.

14. ATTORNEY'S FEES

14.1 Should Brimer prevail on any motion, application for an order to show cause, or other proceeding to enforce a violation of this Consent Judgment, Brimer shall be entitled to his reasonable attorney fees and costs incurred as a result of such motion or application, consistent with CCP § 1021.5. Should Picnic Time prevail on any motion or application for an order to show cause or other proceeding, Picnic Time may be awarded its reasonable attorney fees and costs as a result of such motion or application upon a finding by the court that Brimer's prosecution of the motion or application lacked substantial justification. For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, *et seq.*

14.2 Except as specifically provided in the above paragraph and in Section 4.1, each Party shall bear its own costs and attorney's fees in connection with this action.

14.3 Nothing in this Section **Error! Reference source not found.**4 shall preclude a Party from seeking an award of sanctions pursuant to law. Both parties shall make a good faith effort to resolve any dispute arising hereunder with the other before bringing a motion to enforce the terms of this Consent Judgment.

15. COUNTERPARTS, FACSIMILE SIGNATURES

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

16. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

AGREED TO:

Date: 10-20-10

By: _____
Plaintiff Russell Brimer

AGREED TO:

Date: _____

By: _____
Gustavo Cosaro
Picnic Time, Inc.

IT IS SO ORDERED.

Dated: _____

By _____
Judge of the Superior Court

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16. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

AGREED TO:

Date: _____

By: _____
Plaintiff Russell Brimer

AGREED TO:

Date: 10.20.10

By: _____
Gustavo Cosaro
Picnic Time, Inc.

IT IS SO ORDERED.

Dated: _____

By _____
Judge of the Superior Court

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