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11 RUSSELL BRIMER

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF ALAMEDA
15 UNLIMITED CIVIL JURISDICTION

16 RUSSELL BRIMER,

17 Plaintiff,

18 v.

19 KMART CORPORATION; NOTIONS
20 MARKETING CORPORATION; and DOES
21 1-150, inclusive,

22 Defendants.

Case No. RG10535325

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Notions Marketing Corporation**

3 This Consent Judgment is entered into by and between plaintiff, Russell Brimer (“Brimer” or
4 “Plaintiff”) and defendant, Notions Marketing Corporation (“Notions Marketing” or “Defendant”),
5 with Brimer and Notions Marketing collectively referred to as the “parties” and individually as a
6 “party.”

7 **1.2 Plaintiff**

8 Brimer is an individual residing in California who brought this action as a citizen enforcer of
9 Proposition 65 pursuant to California Health & Safety Code § 25249.7(d).

10 **1.3 Defendant**

11 Notions Marketing employs ten or more persons and is a person in the course of doing
12 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California
13 Health & Safety Code § 25249.6 *et seq.* (“Proposition 65”). Notions Marketing is engaged in the
14 distribution and third-party sale of certain craft and hobby products, and does not manufacture such
15 products.

16 **1.4 General Allegations**

17 Brimer alleges that Notions Marketing has manufactured, distributed, and/or sold in the state
18 of California tape measures containing lead. Lead is listed pursuant to Proposition 65 as a chemical
19 known to the state of California to cause birth defects and other reproductive harm. Lead is referred
20 to herein as the “Listed Chemical.”

21 **1.5 Product Description**

22 The products that are covered by this Consent Judgment are tape measures with accessible
23 components containing the Listed Chemical including, but not limited to, *Animal Tape Measure*
24 *Monkey, Model # ATM-MONK, Item #1990000000086504*. All such items shall be referred to
25 hereinafter as the “Products.”

26 **1.6 Notices of Violation**

27 On or about March 19, 2010, Brimer served defendant, Kmart Corporation (“Kmart”), and
28 various public enforcement agencies with a document entitled "60-Day Notice of Violation of

1 Proposition 65" ("Notice") that informed the recipients that Kmart was allegedly in violation of
2 California Health & Safety Code §25249.6 for failing to warn its customers and consumers in
3 California that the Products exposed users to the Listed Chemical.

4 On or about December 21, 2010, Brimer served Notions Marketing, and its retail customer,
5 Kmart, and various public enforcement agencies with a document entitled "Supplemental 60-Day
6 Notice of Violation" ("Supplemental Notice") which informed those recipients that Notions
7 Marketing was also alleged to be in violation of Health & Safety Code § 25249.6 for the unwarned
8 sales of the Products in California. The Notice and the Supplemental Notice shall be referred to
9 collectively as the "Notices." To the best of the parties' knowledge no public enforcer has
10 commenced and diligently prosecuted the allegations set forth in the Notices.

11 **1.7 Complaint**

12 On September 8, 2010, Brimer, acting in the interest of the general public in California, filed
13 the instant action against Kmart for the violations of Health and Safety Code § 25249.6 alleged in the
14 Notice. Thereafter, on April 4, 2011, Brimer filed the First Amended Complaint ("Complaint"), the
15 operative pleading in this action, adding Notions Marketing as a defendant for the violations of Health
16 and Safety Code § 25249.6 alleged in the Supplemental Notice.

17 **1.8 No Admission**

18 Notions Marketing denies the material, factual, and legal allegations contained in the Notices
19 and it expressly denies any wrongdoing. Notions Marketing further maintains that all of the products
20 it has distributed and/or sold in California, including the Products, have been, and are, in compliance
21 with all laws. Nothing in this Consent Judgment shall be construed as an admission by Notions
22 Marketing of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall
23 compliance with this Consent Judgment constitute or be construed as an admission of any fact,
24 finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by
25 Notions Marketing. This section shall not, however, diminish or otherwise affect the obligations,
26 responsibilities, and duties of Notions Marketing under this Consent Judgment.

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28

1 **1.9 Consent to Jurisdiction**

2 For purposes of this Consent Judgment only, the parties stipulate that this Court has
3 jurisdiction over Notions Marketing as to the allegations contained in the Complaint, that venue is
4 proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce the
5 provisions of this Consent Judgment pursuant to Code of Civil Procedure § 664.6.

6 **1.10 Effective Date**

7 For purposes of this Consent Judgment, “Effective Date” shall mean the date that this Consent
8 Judgment is fully executed by the parties.

9 **2. INJUNCTIVE RELIEF: REFORMULATION**

10 **2.1 Reformulation Commitment**

11 Beginning on December 1, 2011, Notions Marketing shall only ship, sell, or offer to ship to an
12 unaffiliated third party for sale in California Products that are “Lead Free.” For purposes of this
13 Consent Judgment, “Lead Free” shall mean Products with accessible components (i.e., components
14 that may be handled, touched, or mouthed by a consumer during reasonably foreseeable use), that
15 contain no more than 100 parts per million of the Listed Chemical when analyzed pursuant to
16 Environmental Protection Agency testing methodologies 3050B and/or 6010B, and that yield a result
17 of no more than 1.0 microgram of the Listed Chemical when analyzed pursuant to the NIOSH 9100
18 testing protocol.

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), and in settlement of all claims alleged in the
22 Notices and Complaint and referred to in this Consent Judgment, Notions Marketing shall pay \$3,000
23 in civil penalties. This amount reflects a penalty credit of \$5,000 provided by Brimer in response to
24 Notions Marketing’s cooperation in the resolution of this action and its commitment to Proposition 65
25 compliance by offering only Lead Free Products after the Effective Date.

26 Penalty payments shall be allocated according to Health & Safety Code §§ (c)(1) & (d), with
27 seventy-five percent of the penalty amount paid to the California Office of Environmental Health
28 Hazard Assessment (“OEHHA”) and the remaining twenty-five percent remitted to Brimer. Notions

1 Marketing shall issue two checks for the penalty payment payable to: (a) “The Chanler Group in Trust
2 for the OEHHA” in the amount of \$2,250; and (b) “The Chanler Group in Trust for Russell Brimer”
3 in the amount of \$750. Two 1099 forms shall also be provided for payments to: (a) Office of
4 Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-
5 0284486); and (b) Russell Brimer, whose address and tax identification number shall be furnished
6 upon request five days before payment is due. The payments shall be delivered to Brimer’s counsel
7 on or before September 15, 2011 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 agreement on the amount of attorney fees and costs to be reimbursed to them, thereby
15 leaving the fee issue to be resolved after the material terms of the agreement had been settled.
16 Notions Marketing then expressed a desire to resolve the fee and cost issue shortly after the parties
17 finalized the other settlement terms. The parties then attempted to (and did) reach an accord on the
18 compensation due to Brimer and his counsel under general contract principles and the private attorney
19 general doctrine codified at California Code of Civil Procedure (CCP) § 1021.5 for all work
20 performed through the mutual execution of this agreement. Notions Marketing shall pay \$26,500 for
21 fees and costs incurred as a result of investigating, bringing this matter to Notions Marketing’s
22 attention, litigating, and negotiating a settlement in the public interest. Notions Marketing shall
23 provide payment in the form of a check payable to “The Chanler Group.” A third 1099 form for fees
24 and costs paid to The Chanler Group (EIN: 94-3171522) shall also be provided. Payment shall be
25 delivered to Brimer’s counsel on or before September 15, 2011 at the following address:

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

1 **5. RELEASE OF ALL CLAIMS**

2 **5.1 Full, Final and Binding Resolution of Proposition 65 Allegations**

3 This Consent Judgment is a full, final and binding resolution between Brimer, on behalf of
4 himself and the public, and Notions Marketing, of any violation of Proposition 65 that was or could
5 have been asserted against Notions Marketing, its parents, subsidiaries, affiliated entities under
6 common ownership, directors, officers, employees, attorneys, and each entity to whom Notions
7 Marketing directly or indirectly distributes or sells the Products, including, without limitation,
8 downstream distributors, wholesalers, customers (including Kmart), retailers, franchisees, cooperative
9 members, licensors, and licensees (“Releasees”), and each of their parents, subsidiaries, and affiliates,
10 based on the alleged failure to warn about exposures to the Listed Chemical contained in the Products
11 sold by Notions Marketing.

12 **5.2 Brimer’s Public Release of Proposition 65 Claims**

13 In further consideration of the promises and agreements contained herein, Brimer, on behalf of
14 himself, his past and current agents, representatives, attorneys, successors, and/or assignees, and in the
15 interest of the general public, hereby waives all rights to institute or participate in, directly or
16 indirectly, any form of legal action and releases all claims, including, without limitation, all actions
17 and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
18 penalties, losses, or expenses, including, without limitation, investigation fees, expert fees, and
19 attorneys’ fees (collectively “Claims”), although exclusive of fees and costs on appeal, if any, arising
20 under Proposition 65. The release provided by this section is limited to those claims that were
21 brought or could have been brought against Notions Marketing and the Releasees for their alleged
22 failure to warn of exposures to the Listed Chemical contained in the Products sold by Notions
23 Marketing.

24 **5.3 Brimer’s Individual Release of Claims**

25 Brimer, in his individual capacity only and *not* in his representative capacity, provides a
26 release which shall be effective as a full and final accord and satisfaction, as a bar to all Claims,
27 liabilities and demands of any nature, character or kind, whether known or unknown, suspected or
28

1 unsuspected, arising out of alleged or actual exposures to Listed Chemical contained in the Products
2 sold by Notions Marketing.

3 **5.4 Notions Marketing's Release of Brimer**

4 Notions Marketing on behalf of itself, its past and current agents, representatives, attorneys,
5 successors, and/or assignees, hereby waives any and all claims against Brimer and his attorneys and
6 other representatives for any and all actions taken or statements made (or those that could have been
7 taken or made) by Brimer and his attorneys and other representatives, whether in the course of
8 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter, or with
9 respect to the Products.

10 **6. COURT APPROVAL**

11 This Consent Judgment is not effective until it is approved and entered by the Court and shall
12 be null and void if, for any reason, it is not approved and entered within one year after it has been
13 fully executed. In which event, any monies that have been provided to Brimer or his counsel pursuant
14 to section 3.1 and/or 4.1 shall be refunded within fifteen days after receiving written notice from
15 Notions Marketing that the one-year period has expired. This Consent Judgment constitutes a full and
16 final adjudication on the merits of all claims raised in this action, and shall operate as a bar to any
17 further claims or causes of action against the Releasees that arise under Proposition 65, as such claims
18 relate to Notions Marketing's alleged failure to warn about the Listed Chemical contained in the
19 Products.

20 **7. SEVERABILITY**

21 If subsequent to the execution of this Consent Judgment any of its provisions are held by a
22 court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely
23 affected.

24 **8. GOVERNING LAW**

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

1 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
2 so affected.

3 **9. NOTICES**

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

8 For Notions Marketing:

9 Robert L. Hines, Esq.
10 Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
11 San Francisco, CA 94104

12 For Brimer:

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

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

18 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

19 This Consent Judgment may be executed in counterparts and by facsimile or pdf, each of
20 which shall be deemed an original, and all of which, when taken together, shall constitute one and the
21 same document.

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

23 Brimer agrees to comply with the reporting form requirements referenced in California Health
24 & Safety Code § 25249.7(f)(1). The parties acknowledge that, pursuant to Health & Safety Code
25 § 25249.7(f)(4), Brimer must submit this Consent Judgment to the Court upon noticed motion to
26 obtain judicial approval their settlement. In furtherance of obtaining such approval, Brimer and
27 Notions Marketing and their respective counsel agree to mutually employ their best efforts to obtain
28 judicial approval of this Consent Judgment and support the entry of judgment by the Court pursuant to

1 the terms of the Consent Judgment in a timely manner. For purposes of this paragraph, "best efforts"
2 shall include, at a minimum, cooperating on the drafting and filing of any papers in support of the
3 required motion for judicial approval.

4 **12. DISMISSAL OF KMART CORPORATION**

5 Within five calendar days of an order issued by the Court approving this Consent Judgment
6 and entering judgment pursuant to the terms contained herein, Brimer shall file a Request for
7 Dismissal with prejudice as to defendant Kmart.

8 **13. MODIFICATION**

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

14 **14. AUTHORIZATION**

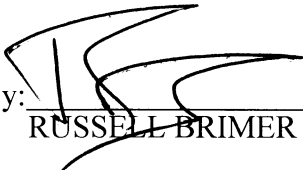
15 The undersigned are authorized to execute this Consent Judgment on behalf of their respective
16 party and have read, understood, and agree to all of the terms and conditions hereof.

17
18 **AGREED TO:**

AGREED TO:

19 Date: 8-16-11

Date: _____

20
21 
22 By: _____
RUSSELL BRIMER

By: _____
Jay Klein, President
NOTIONS MARKETING CORPORATION

1 the terms of the Consent Judgment in a timely manner. For purposes of this paragraph, "best efforts"
2 shall include, at a minimum, cooperating on the drafting and filing of any papers in support of the
3 required motion for judicial approval.

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12 served with notice of any proposed modification to this Consent Judgment at least fifteen days in
13 advance of its consideration by the Court.

14 **14. AUTHORIZATION**

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

17
18 **AGREED TO:**

AGREED TO:

19 Date: _____

Date: August 24, 2011

20
21 By: _____
22 **RUSSELL BRIMER**

By:  _____
Jay Klein, President
NOTIONS MARKETING CORPORATION

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