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RUSSELL BRIMER

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 THE COUNTY OF ALAMEDA
10 UNLIMITED CIVIL JURISDICTION

11
12 RUSSELL BRIMER,

13 Plaintiff,

14 v.

15
16 URBAN OUTFITTERS, INC.; *et al.*,

17 Defendants.

18 URBAN OUTFITTERS, INC.,

19 Cross-Complainant,

20 v.

21 SMARTEK USA INC.; a New York
22 corporation,

23 Cross-Defendant

Case No. RG10543129

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code § 25249.6

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Smartek USA Inc.**

3 This Consent Judgment is entered into by and between Russell Brimer (“Brimer”) and
4 Smartek USA Inc. (“Smartek”), with Brimer and Smartek collectively referred to as the “Parties.”

5 **1.2 Plaintiff**

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

9 **1.3 Defendant**

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

13 **1.4 Plaintiff’s General Allegations**

14 Plaintiff alleges that Smartek has manufactured, distributed, and/or offered for sale vinyl-
15 coated tape measures containing lead, without the requisite Proposition 65 warnings. Lead
16 (hereinafter the “Listed Chemical”) is listed pursuant to Proposition 65 as a chemical known to the
17 State of California to cause birth defects and other reproductive harm.

18 **1.5 Product Description**

19 The products that are covered by this Consent Judgment are defined as follows: vinyl-coated
20 tape measures that contain the Listed Chemical and were and/or are offered for sale in California by
21 Smartek, such as, but not limited to, the vinyl coated tape measure contained in the *Smartek*
22 *Compact Foldaway Sewing Box, Model RX-24C, Item #16848327 (#8 92013 00050 0)*. All such
23 vinyl-coated tape measures containing the Listed Chemical are referred to hereinafter as the
24 “Products.”

25 **1.6 Notices of Violation**

26 On or about May 7, 2010, Brimer served Urban Outfitters, Inc. (“Urban Outfitters”) and
27 various public enforcement agencies with a document entitled “60-Day Notice of Violation” that
28 provided Urban Outfitters, Inc. and public enforcers with notice of Urban Outfitters’ alleged

1 violations of Proposition 65 for failing to warn consumers and customers that the Products that
2 Urban Outfitters was offering for sale in California, including but not limited to, the *Smartek*
3 *Compact Foldaway Sewing Box, Model RX-24C, Item #16848327 (#8 92013 00050 0)*, exposed
4 users in California to the Listed Chemical. On or about April 8, 2011, Brimer served Smartek and
5 various public enforcement agencies with a document entitled “Supplemental 60-Day Notice of
6 Violation” that provided Smartek and public enforcers with notice of Smartek’s alleged violations
7 of Proposition 65 for failing to warn consumers and customers that the Products that Smartek and
8 Urban Outfitters was offering for sale in California, including but not limited to, the *Smartek*
9 *Compact Foldaway Sewing Box, Model RX-24C, Item #16848327 (#8 92013 00050 0)*, exposed
10 users in California to the Listed Chemical (collectively “Notices”).

11 **1.7 Complaint and Cross-Complaint**

12 On October 22, 2010, Brimer, who alleges that he was and is acting in the interest of the
13 general public in California, filed a complaint in the Alameda Superior Court naming Urban
14 Outfitters as a defendant and alleging that it had violated of Proposition 65 by failing to warn
15 consumers and customers that the Products that Urban Outfitters was offering for sale in California,
16 including but not limited to, the *Smartek Compact Foldaway Sewing Box, Model RX-24C, Item*
17 *#16848327 (#8 92013 00050 0)*, exposed users in California to the Listed Chemical (the
18 “Complaint”). Urban Outfitters denies the allegations.

19 On November 22, 2010, Urban Outfitters filed a cross-complaint against Smartek for
20 declaratory relief, indemnity, breach of contract and breach of warranty of merchantability, claiming
21 that Smartek was the vendor that sold to Urban Outfitters the *Smartek Compact Foldaway Sewing*
22 *Box, Model RX-24C, Item #16848327 (#8 92013 00050 0)*, and thus, is responsible for Plaintiff’s
23 alleged injuries, among other things (the “Cross-Complaint”). Smartek denies the allegations.

24 On or about June 15, 2011, Brimer amended the Complaint to include Smartek as a
25 “Manufacturer Doe No. 1.”

26 **1.8 No Admission**

27 Smartek and Urban Outfitters deny the material, factual and legal allegations contained in
28 Brimer’s Notice and in the Complaint and maintain that the Products that each has offered for sale,

1 sold and/or distributed in California have been, and are, in compliance with all laws. Nothing in
2 this Consent Judgment shall be construed as an admission by Smartek and Urban Outfitters of any
3 fact, finding, conclusion, issue of law, or violation of law; nor shall compliance with this Consent
4 Judgment constitute or be construed as an admission by Smartek and Urban Outfitters of any fact,
5 finding, conclusion, issue of law, or violation of law, such being specifically denied by Smartek and
6 Urban Outfitters. However, this section shall not diminish or otherwise affect the obligations,
7 responsibilities and duties of Smartek under this Consent Judgment.

8 **1.9 Consent to Jurisdiction**

9 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
10 jurisdiction over Smartek as to the allegations contained in the Complaint and/or Cross-Complaint,
11 that venue is proper in the County of Alameda, and that this Court has jurisdiction to enter and
12 enforce the provisions of this Consent Judgment.

13 **1.10 Effective Date**

14 For purposes of this Consent Judgment, the term "Effective Date" shall mean June 30, 2011.

15 **2. INJUNCTIVE RELIEF**

16 **2.1 Reformulation**

17 As of the Effective Date, Smartek shall not sell or offer for sale in California any Products
18 that are not Lead Free. For purposes of this Consent Judgment, "Lead Free" Products shall mean
19 Products that contain no more than 100 ppm of lead when analyzed pursuant to Environmental
20 Protection Agency testing methodologies 3050B or equivalent methods and yield no more than 1.0
21 micrograms of lead when analyzed pursuant to NIOSH Test Method 9100 performed on any
22 accessible component (i.e. any component part that may be handled, touched or mouthed during the
23 reasonably foreseeable use or misuse by a consumer).

24 **3. MONETARY PAYMENTS**

25 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

26 In settlement of all the claims set forth in the Complaint against Urban Outfitters, and of all
27 the claims Brimer has against Smartek related to the Products and the Listed Chemical referred to in
28

1 the Complaint and this Consent Judgment against it, Smartek shall make payments totaling \$2,000
2 in civil penalties, as follows:

3 Smartek shall make a payment of \$2,000 to be apportioned in accordance with Health &
4 Safety Code § 25249.12 (c)(1) and (d), with 75% of these funds remitted to the State of California's
5 Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of these
6 penalty monies remitted to Brimer as provided by Health & Safety Code § 25249.12(d). Smartek
7 shall issue two checks for the penalty payment: (a) one check made payable to "The Chanler Group
8 in Trust for Office of Environmental Health Hazard Assessment" in the amount of \$1,500, and (b)
9 one check to "The Chanler Group in Trust for Russell Brimer" in the amount of \$500. Two 1099s
10 shall be issued for the above payments to: (a) Office of Environmental Health Hazard Assessment,
11 P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose address
12 and tax identification number shall be furnished, upon request, at least five (5) calendar days before
13 payment is due.

14 All payments shall be delivered to the following address on or before July 30, 2011:

15 The Chanler Group
16 Attn: Proposition 65 Controller
17 2560 Ninth Street, Suite 214
18 Berkeley, CA 94710

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

19 **4.1 Attorney Fees and Costs**

20 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
21 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
22 issue to be resolved after the material terms of the agreement had been settled. Smartek expressed a
23 desire to resolve the fee and cost issue as part of the settlement terms to determine whether a
24 settlement could be finalized. The parties then attempted to (and did) reach an accord on the
25 compensation due to Brimer and his counsel under general contract principles and the private
26 attorney general doctrine codified at California Code of Civil Procedure (CCP) §1021.5, for all
27 work performed through the mutual execution of this agreement. Smartek shall reimburse Brimer
28 and his counsel the total of \$24,000 for fees and costs incurred as a result of investigating, bringing

1 this matter to Smartek's attention, and litigating and negotiating a settlement in the public interest,
2 as follows:

3 \$6,000 on or before July 30, 2011;

4 \$6,000 on or before August 31, 2011;

5 \$6,000 on or before September 30, 2011;

6 \$6,000 on or before October 31, 2011;

7 Smartek shall issue a separate 1099 for fees and costs (EIN: 94-3171522), make the check
8 payable to "The Chanler Group", and deliver all payments at the following address:

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

12 **5. CLAIMS COVERED AND RELEASED**

13 **5.1 Full, Final and Binding Resolution of Proposition 65 Allegations.** This Consent
14 Judgment is a full, final and binding resolution between Brimer, on behalf of himself and the public,
15 and Smartek, of any violation of Proposition 65 that was or could have been asserted by Brimer
16 against Smartek, its parents, subsidiaries, affiliated entities that are under common ownership,
17 directors, officers, employees, attorneys, and each entity to whom Smartek directly or indirectly
18 distributes or sells Products, including but not limited to downstream distributors, wholesalers,
19 customers, retailers, including but not limited to Urban Outfitters and Urban Outfitters West LLC,
20 franchisees, cooperative members, licensors, and licensees ("Releasees"), based on their failure to
21 warn about alleged exposures to the Listed Chemical contained in the Products that were sold by
22 Smartek.

23 **5.2 Brimer's Public Release of Proposition 65 Claims.** In further consideration of the
24 promises and agreements herein contained, Brimer on behalf of himself, his past and current agents,
25 representatives, attorneys, successors, and/or assignees, and in the interest of the general public,
26 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
27 and releases all claims, including, without limitation, all actions, and causes of action, in law or in
28 equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses --

1 including, but not limited to, investigation fees, expert fees, and attorneys' fees, but exclusive of
2 fees and costs on appeal -- limited to and arising under Proposition 65 with respect to the Listed
3 Chemical in the Products sold by Smartek (collectively "claims"), against Smartek and Releasees.

4 **5.3 Brimer's Individual Release of Claims.** Brimer also, in his individual capacity
5 only and *not* in his representative capacity, provides a release herein to Smartek, Urban Outfitters
6 and/or Urban Outfitters West LLC, which shall be effective as a full and final accord and
7 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
8 damages, losses, claims, liabilities and demands of Brimer of any nature, character or kind, whether
9 known or unknown, suspected or unsuspected, limited to and arising out of alleged or actual
10 exposures to the Listed Chemical in the Products manufactured, distributed or sold by Smartek.

11 **5.4 Smartek's Release of Brimer.** Smartek on behalf of itself, its past and current
12 agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims
13 against Brimer, his attorneys and other representatives, for any and all actions taken or statements
14 made (or those that could have been taken or made) by Brimer and his attorneys and other
15 representatives, whether in the course of investigating claims or otherwise seeking to enforce
16 Proposition 65 against it in this matter with respect to the Products.

17 **6. COURT APPROVAL**

18 This Consent Judgment is not effective until it is approved and entered by the Court and
19 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
20 after it has been fully executed by all Parties, in which event any monies that have been provided to
21 Brimer or his counsel pursuant to Section 3.1 and/or Section 4.1 above shall be refunded within
22 fifteen (15) days of receiving written notice from Smartek that the one-year period has expired.

23 Whereas, Brimer knows of no other claims arising out of alleged or actual exposures to the
24 Listed Chemical in Products (as defined in section 1.5 above) sold by Urban Outfitters (and/or its
25 affiliated companies Urban Outfitters West LLC and Anthropologie) that are supplied by a
26 company not affiliated with Smartek, Brimer shall dismiss his complaint in the above-entitled
27 action without prejudice as to defendant Urban Outfitters within ten business days of court approval
28 of this Consent Judgment.

1 **7. SEVERABILITY**

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

5 **8. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the State of California
7 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
8 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Smartek
9 may provide written notice to Brimer of any asserted change in the law, and shall have no further
10 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products
11 are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Smartek from any
12 obligation to comply with any pertinent state or federal toxics control laws.

13 **9. NOTICES**

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

18 For Smartek:

19 Laura G. Brys
20 Burris, Schoenberg & Walden LLP
21 12121 Wilchire Blvd., Suite 800
22 Los Angeles, CA 90025

23 For Brimer:

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

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

10. **COUNTERPARTS; FACSIMILE SIGNATURES**

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

11. **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)

12. **ADDITIONAL POST EXECUTION ACTIVITIES**

The Parties acknowledge that, pursuant to California 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 Smartek 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. For purposes of this section, best efforts shall include, at a minimum, cooperating on the drafting and filing of any papers in support of the required motion for judicial approval.

13. **MODIFICATION**

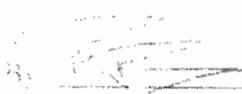
This Consent Judgment may be modified only: (1) by written agreement of the Parties and upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of any party and entry of a modified consent judgment by the Court.

14. **AUTHORIZATION**

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

AGREED TO:

Date: July 8, 11


Russell Brimer

AGREED TO:

Date: July 14, 11

By: 
Name Michael Kety
Title President
Smartek USA Inc.