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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF CONTRA COSTA
11 UNLIMITED CIVIL JURISDICTION
12

13 RUSSELL BRIMER,

14 Plaintiff,

15 v.

16 MAKING MEMORIES WHOLESAL, INC.;
and DOES 1-150, inclusive,

17 Defendants.
18

Case No. C10-03254

[PROPOSED] CONSENT JUDGMENT

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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Russell Brimer,
4 (“Brimer” or “Plaintiff”), and defendant, Making Memories Wholesale, Inc. (“Making Memories”
5 or “Defendant”), with Plaintiff and Defendant collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Making Memories employs ten or more individuals 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”).

14 **1.4 General Allegations**

15 Brimer alleges that Making Memories has manufactured, distributed, and/or sold in the
16 State of California, wristlets that expose users to lead, and scrap books/photo albums that expose
17 users to lead and/or the phthalate chemical di(2-ethylhexyl)phthalate (“DEHP”) (collectively
18 “Products”) without first providing a “clear and reasonable warning” as required under
19 Proposition 65. Lead and DEHP are each listed pursuant Proposition 65 as chemicals that are
20 known to the State of California to cause cancer, birth defects and/or other reproductive harm.
21 Lead and DEHP are referred to collectively hereinafter as the “Listed Chemicals.”

22 **1.5 Notices of Violation**

23 On May 7, 2010, Brimer served Making Memories and various public enforcement
24 agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided the
25 public enforcers and Making Memories with notice that Making Memories was alleged to be in
26 violation of Health & Safety Code § 25249.6 for failing to warn its customers and consumers in
27 California that the wristlets expose users to lead.

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1 On June 29, 2011, Brimer served Making Memories and various public enforcement
2 agencies with a document entitled "Supplemental 60-Day Notice of Violation" ("Supplemental
3 Notice") alleging that Making Memories had further violated Health & Safety Code § 25249.6 for
4 failing to warn its customers and consumers in California that the scrap books/photo albums
5 expose users to the Listed Chemicals. The Notice and Supplemental Notice are referred to
6 collectively hereinafter as "Notices." To the best of the Parties' knowledge, no public enforcer
7 has commenced and is diligently prosecuting any of the allegations set forth in the Notices.

8 **1.6 Complaint**

9 On November 12, 2010, Brimer, acting in a representative capacity in the interest of the
10 general public in California, filed the instant action ("Complaint") naming Making Memories as a
11 defendant, and stating a cause of action for the violations of Health & Safety Code § 25249.6
12 alleged in the Notice. Following the expiration of more than 66 days after Plaintiff's service of
13 the Supplemental Notice, and upon entry of this Consent Judgment, the Complaint shall be
14 deemed amended *nunc pro tunc* as of September 3, 2011, to include the scrap books/photo albums
15 sold by Making Memories in California and the violations of Proposition 65 alleged in the
16 Supplemental Notice.

17 **1.7 No Admission**

18 This Consent Judgment resolves claims that are denied and disputed by Defendant. The
19 Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all
20 claims between the Parties for the purpose of avoiding prolonged litigation. Making Memories
21 denies the material, factual, and legal allegations contained in the Notices and Complaint, and
22 maintains that all of the products it has manufactured, distributed, and/or sold in California,
23 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
24 Judgment shall be construed as an admission by Making Memories of any fact, finding,
25 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent
26 Judgment constitute or be construed as an admission by Making Memories of any fact, finding,
27 conclusion of law, issue of law, or violation of law, the same being specifically denied by Making
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1 Memories. However, this Section shall not diminish or otherwise affect the Parties' obligations,
2 responsibilities, and/or duties under this Consent Judgment.

3 **1.8 Consent to Jurisdiction**

4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
5 jurisdiction over Making Memories as to the allegations contained in the Complaint, that venue is
6 proper in the County of Contra Costa, and that this Court has jurisdiction to enter and enforce the
7 provisions of this Consent Judgment.

8 **1.9 Effective Date**

9 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
10 this Consent Judgment is fully executed by the Parties.

11 **2. INJUNCTIVE RELIEF: REFORMULATION**

12 **2.1 Reformulation Commitment**

13 Commencing on December 31, 2011, Making Memories commits that it shall only ship
14 for sale, import and/or have manufactured for sale in California, Products that are Lead Free and
15 DEHP Free. For purposes of this Consent Judgment, "Lead Free" shall mean Products with
16 accessible components (i.e. components that may be handled, touched or mouthed by a consumer
17 during reasonably foreseeable use) that contain lead in concentrations not to exceed 100 parts per
18 million when analyzed pursuant to Environmental Protection Agency testing methodologies
19 3580A and 6010B, or equivalent methodologies utilized by federal or state agencies for the
20 purpose of determining lead content in a solid substance; and that yield a result of no more than
21 1.0 microgram of lead when analyzed pursuant to NIOSH Test Method 9100. "DEHP Free" shall
22 mean products that contain no more than 1,000 parts per million of DEHP when analyzed
23 pursuant EPA testing methodologies 3580A and 8270C or equivalent methodologies utilized by
24 federal or state agencies for purposes of determining phthalate content in a solid substance.
25 Products that are Lead Free and/or DEHP Free are referred to collectively hereinafter as
26 "Reformulated Products."
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1 **3. MONETARY PAYMENTS**

2 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

3 In settlement of all the claims alleged in the Notices and Complaint and referred to in this
4 Consent Judgment, Making Memories shall pay \$3,000 in civil penalties. This amount reflects a
5 penalty credit of \$7,000 provided by Brimer in response to Making Memories commitment to
6 offer only Reformulated Products for sale in California after November 15, 2011. The civil
7 penalties are to be apportioned in accordance with California Health & Safety Code §§
8 25249.12(c)(1) & (d), with 75% of the funds remitted to the State of California's Office of
9 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty
10 paid to Brimer.

11 Making Memories shall issue two checks for its penalty payment to: (a) "The Chanler
12 Group in Trust for OEHHA" in the amount of \$2,250; and (b) "The Chanler Group in Trust for
13 Russell Brimer" in the amount of \$750. Two 1099 forms shall also be issued for the above
14 payments to: (a) Office of Environmental Health Hazard Assessment, P.O. Box 4010,
15 Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose tax information
16 shall be provided five (5) calendar days before the payment is due.

17 The penalty payment shall be delivered to Brimer's counsel on or before September 16,
18 2011, at the following address:

19 The Chanler Group
20 Attn: Proposition 65 Coordinator
21 2560 Ninth Street
22 Parker Plaza, Suite 214
23 Berkeley, CA 94710

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

23 **4.1 Attorney Fees and Costs**

24 The parties acknowledge that Brimer and his counsel offered to resolve this dispute
25 without reaching agreement on the amount of attorney fees and costs to be reimbursed to them,
26 thereby leaving the issue to be resolved after the material terms of the agreement had been settled.
27 Making Memories then expressed a desire to resolve the fee and cost issue shortly after the other
28 settlement terms had been finalized. The parties then attempted to (and did) reach an accord on

1 the compensation due to Brimer and his counsel under general contract principles and the private
2 attorney general doctrine codified at California Code of Civil Procedure § 1021.5, for all work
3 performed through the mutual execution of this agreement and entry of this Consent Judgment.
4 Making Memories shall pay \$25,000 for fees and costs relating to the Notices, Complaint, and
5 this Consent Judgment, including, without limitation, investigating, bringing this matter to
6 Making Memories' attention, litigating and negotiating a settlement in the public interest, but not
7 including any fees on appeal. Payment for fees and costs to be reimbursed pursuant to this
8 section shall be due as follows:

- 9 a) \$11,000 on or before September 16, 2011; and
- 10 b) \$14,000 on or before November 15, 2011.

11
12 Making Memories shall send the above payments in the form of a check payable to "The Chanler
13 Group" at the following address:

14 The Chanler Group
15 Attn: Proposition 65 Controller
16 2560 Ninth Street
17 Parker Plaza, Suite 214
18 Berkeley, CA 94710-2565

19 Making Memories shall also issue a third 1099 form, for all payments made pursuant to this
20 Section, to "The Chanler Group" (EIN: 94-3171522).

21 **5. CLAIMS COVERED AND RELEASED**

22 **5.1 Full, Final and Binding Resolution of Proposition 65 Allegations**

23 This Consent Judgment is a full, final, and binding resolution between Brimer, acting on
24 behalf of himself and in the interest of the general public, and Defendant, its owners, subsidiaries,
25 affiliates, sister and related companies, employees, shareholders, directors, insurers, attorneys,
26 successors, and assigns ("Defendant Releasees"), and all entities to whom they directly or
27 indirectly distribute or sell Products, including but not limited to distributors, wholesalers,
28 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

1 been, or could have been, asserted against Defendant Releasees and Downstream Defendant
2 Releasees individually or in the public interest regarding the failure to warn about exposures to
3 the Listed Chemicals contained in the Products. Defendant's compliance with this Consent
4 Judgment shall constitute compliance with Proposition 65 with respect to alleged or actual
5 exposures to the Listed Chemicals contained in the Products.

6 **5.2 Brimer's Public Release of Proposition 65 Claims**

7 In further consideration of the promises and agreements herein contained, Brimer on
8 behalf of himself, his past and current agents, representatives, attorneys, successors, and/or
9 assignees, and in the interest of the general public, hereby waives all rights to institute or
10 participate in, directly or indirectly, any form of legal action and releases all claims, including,
11 without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands,
12 obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to,
13 investigation fees, expert fees, and attorneys' fees (exclusive of any fees on appeal))(collectively
14 "Claims") against Defendant Releasees and Downstream Defendant Releasees arising under
15 Proposition 65 that were brought or could have been brought based on an alleged failure to warn
16 about exposures to the Listed Chemicals contained in the Products.

17 **5.3 Brimer's Individual Release of Claims**

18 Brimer, also on behalf of himself, his past and current agents, representatives, attorneys,
19 successors, and/or assignees and *not* in his representative capacity, provides a general release
20 herein which shall be effective as a full and final accord and satisfaction, as a bar to all Claims,
21 liabilities and demands of any nature, character or kind, known or unknown, suspected or
22 unsuspected, as such claims relate to the Products sold by Defendant Releasees and Downstream
23 Defendant Releasees in California. Brimer further acknowledges that he is familiar with Civil
24 Code § 1542, which provides as follows:

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27 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
28 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS
FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF

1 KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS
2 SETTLEMENT WITH THE DEBTOR.

3 Brimer, in his individual capacity only and *not* in his representative capacity, and on behalf of
4 himself, his past and current agents, representatives, attorneys, successors, and/or assignees
5 expressly waives and relinquishes any and all rights and benefits which he may have under, or
6 which may be conferred on him by the provisions of Civil Code § 1542 of the California as well
7 as under any other state or federal statute or common law principle of similar effect, to the fullest
8 extent that he may lawfully waive such rights or benefits pertaining to the released matters.

9 The Parties further understand and agree that, except as provided for above, this release
10 shall not extend upstream to any third parties that manufactured the Products or any component
11 parts thereof, or any distributors or suppliers who sold the Products or any component parts
12 thereof to Defendant. Upon court approval of the Consent Judgment, the Parties waive their
13 respective rights to a hearing or trial on the allegations of the Complaint.

14 **5.3 Making Memories' Release of Brimer**

15 Making Memories on behalf of itself, its past and current agents, representatives,
16 attorneys, successors, and/or assignees, hereby waives any and all claims against Brimer, his
17 attorneys and other representatives, for any and all actions taken or statements made (or those
18 that could have been taken or made) by Brimer and his attorneys and other representatives,
19 whether in the course of investigating claims or otherwise seeking to enforce Proposition 65
20 against it in this matter or with respect to the Products.

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

27 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
28 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS

1 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
2 KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS
3 SETTLEMENT WITH THE DEBTOR.

4 Defendant expressly waives and relinquishes any and all rights and benefits which it may
5 have under, or which may be conferred on it by, the provisions of Civil Code § 1542 as well as
6 under any other state or federal statute or common law principle of similar effect, to the fullest
7 extent that it may lawfully waive such rights or benefits pertaining to the released matters.

8 **6. SEVERABILITY**

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

13 **7. COURT APPROVAL**

14 This Consent Judgment is not effective until it is approved and entered by the Court and
15 shall be null and void if, for any reason, it is not approved and entered by the Court within nine
16 months after it has been fully executed by the Parties. In the event this consent judgment is (a)
17 not entered by this Court within nine months (or thereafter) for any reason whatsoever, or (b) is
18 entered by the Court and subsequently overturned by any appellate court, any monies that have
19 been provided to Brimer, or his counsel pursuant to Sections 3 and 4 above, together with interest
20 at the prevailing federal rate accruing from the date of payment by Defendant, shall be refunded
21 within thirty (30) days after receiving written demand from Defendant for return of such funds.

22 **8. GOVERNING LAW**

23 The terms of this Consent Judgment shall be governed by the laws of the State of
24 California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by
25 reason of law generally, or as to the Products, then Making Memories shall provide written notice
26 to Brimer of any asserted change in the law, and shall have no further obligations pursuant to this
27 Consent Judgment with respect to, and to the extent that, the Products are so affected.
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1 **9. NOTICE**

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

4 To Making Memories:

5 Danny Hansen, Chief Financial Officer
6 Making Memories Wholesale, Inc.
7 415 North Redwood Road
8 North Salt Lake, UT 84054

9 With copy to:

10 J. Robert Maxwell, Esq.
11 Rogers Joseph O'Donnell
12 311 California Street, 10th floor
13 San Francisco, CA 94104

14 To Brimer:

15 The Chanler Group
16 Attn: Proposition 65 Coordinator
17 2560 Ninth Street
18 Parker Plaza, Suite 214
19 Berkeley, CA 94710-2565

20 Any party may modify the person and/or address to which notice is to be sent by informing each
21 other party of its intent by certified mail and/or other verifiable form of written communication.

22 **10. MODIFICATION**

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

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

27 Brimer agrees to comply with the reporting form requirements referenced in California
28 Health & Safety Code §25249.7(f). The Parties further acknowledge that, pursuant to Health &
Safety Code §25249.7(f)(4), a noticed motion is required to obtain judicial approval of this
Consent Judgment. In furtherance of obtaining such approval, Brimer and Making Memories 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 paragraph, "best efforts" shall include, at a minimum,

1 cooperating on the drafting and filing any papers in support of the required motion for judicial
2 approval.

3 **12. ENTIRE AGREEMENT**

4 This Consent Judgment contains the sole and entire agreement and understanding of the
5 Parties. No representations, oral or otherwise, express or implied, other than those contained
6 herein, have been made by any party hereto. No other agreements shall be deemed to exist or to
7 bind any of the parties.

8 **13. COUNTERPARTS, FACSIMILE SIGNATURES**

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

12 **14. AUTHORIZATION**

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

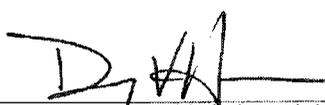
16
17 **AGREED TO:**

AGREED TO:

18 Dated: 9-12-11

Dated: 9-14-11

19
20 By: 
21 Russell Brimer

20 By: 
21 Danny Hansen, Chief Financial Officer
22 Making Memories Wholesale, Inc.

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