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11 RUSSELL BRIMER

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF CONTRA COSTA
14 UNLIMITED CIVIL JURISDICTION

15 RUSSELL BRIMER,
16 Plaintiff,
17 v.
18 TOWER ENERGY GROUP; *et al.*,
19 Defendants.

Case No. C10-03253

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code § 25249.6 *et seq.*

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Russell Brimer (“Brimer”) and
4 Tower Energy Group (“Tower”), with Brimer and Tower 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 to improve human health by reducing or eliminating hazardous
8 substances contained in consumer products.

9 **1.3 Defendant**

10 Tower 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 General Allegations**

14 Tower has manufactured, distributed, and/or offered for sale in California flashlights
15 containing lead, without the requisite Proposition 65 warnings. Lead is listed pursuant to
16 Proposition 65 as a chemical known to the State of California to cause birth defects and other
17 reproductive harm (“Listed Chemical”).

18 **1.5 Product Description**

19 The products that are covered by this Consent Judgment are the Multifunctional LED
20 Flashlights, KC91081 (#8 53371 91081 8), which were imported or manufactured by Kenko China
21 Outlet, not “Lead Free” (as defined below in paragraph 2.3) and sold in California by Tower
22 (hereinafter the “Products”).

23 **1.6 Notice of Violation**

24 On or about July 1, 2010, Brimer served Tower and various public enforcement agencies
25 with a document entitled “60-Day Notice of Violation” (“Notice”) alleging violations of Proposition
26 65 by Tower for failing to warn its customers and consumers in California that the Products that
27 Tower manufactured, distributed and/or sold exposed users to the Listed Chemical.

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1 **1.7 Complaint**

2 On November 12, 2010, Brimer filed the instant action in the Contra Costa Superior Court
3 (“Complaint”), naming Tower as a defendant for the violations of Proposition 65 alleged in the
4 Notice.

5 **1.8 No Admission**

6 Tower denies the material, factual, and legal allegations contained in Brimer’s Notice and
7 Complaint and maintains that all of the products it has sold and distributed in California, including
8 the Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment
9 shall be construed as an admission by Tower of any fact, finding, conclusion, issue of law, or
10 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an
11 admission by Tower of any fact, finding, conclusion, issue of law, or violation of law, such being
12 specifically denied by Tower. This Section shall not, however, diminish or otherwise affect
13 Tower’s obligations, responsibilities and duties under this Consent Judgment.

14 **1.9 Consent to Jurisdiction**

15 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
16 jurisdiction over Tower as to the allegations contained in the Complaint, that venue is proper in the
17 County of Contra Costa, and that this Court has jurisdiction to enter and enforce the provisions of
18 this Consent Judgment pursuant to California Code of Civil Procedure § 664.6, as a full and binding
19 resolution of all claims which were or could have been raised in the Complaint against Tower based
20 on the facts alleged therein and in the Notice.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” shall mean June 8, 2012.

23 **2. INJUNCTIVE RELIEF**

24 Tower asserts that prior to the Effective Date, it ceased selling, or distributing the Products for
25 sale, in California. Should Tower recommence sales of the Products in California at any time in the
26 future it will only offer Products that contain a maximum of 100 parts per million lead content when
27 analyzed pursuant to Environmental Protection Agency testing methodologies 6010B and 3050B or
28 equivalent methods and yield no more than 1.0 microgram of residual lead when analyzed pursuant to

1 NIOSH Test Method 9100 performed on any accessible component (i.e. any component part that may
2 be handled, touched or mouthed during reasonably foreseeable use or misuse by a consumer).

3 **3. MONETARY PAYMENTS**

4 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

5 On or before the Effective Date, Tower shall pay a civil penalty of \$4,000. This amount
6 reflects a credit of \$8,000 agreed to by Brimer in response to Tower's commitment to Proposition 65
7 compliance, including reformulating the Products to comply with the lead content standard
8 established by section 2. The civil penalty payment shall be apportioned in accordance with Health
9 & Safety Code § 25249.12 (c)(1) and (d) with 75% of the penalty funds earmarked for the California
10 Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the
11 penalty amount earmarked for Brimer.

12 **3.2 Reimbursement of Plaintiff's Fees and Costs**

13 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
14 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
15 to be resolved after the material terms of the agreement had been settled. Shortly after the other
16 settlement terms had been finalized, Tower expressed a desire to resolve the fee and cost issue. The
17 Parties then attempted to (and did) reach an accord on the compensation due to Brimer and his
18 counsel under general contract principles and the private attorney general doctrine codified at
19 California Code of Civil Procedure § 1021.5 for all work performed in this matter, exclusive of fees
20 on appeal, if any. Under these legal principles, on or before the Effective Date, Tower shall pay
21 \$35,000 for all fees and costs incurred investigating, litigating and enforcing this matter, including
22 the fees and costs incurred (and yet to be incurred) negotiating, drafting, and obtaining the Court's
23 approval of this Consent Judgment in the public interest.

24 **3.3 Payment Procedures**

25 **3.3.1** All payments made under this Consent Judgment shall be held in trust until
26 the Court approves the Consent Judgment. The Parties acknowledge that Brimer gave Tower the
27 option of depositing the funds into its attorney's trust account, but that Tower elected to have the
28 funds held in trust by The Chanler Group. The settlement funds shall be made by checks payable as

1 follows:

- 2 (a) "The Chanler Group in Trust for OEHHA" in the amount of \$3,000;
- 3 (b) "The Chanler Group in Trust for Brimer" in the amount of \$1,000; and
- 4 (c) "The Chanler Group in Trust" in the amount of \$35,000.

5 **3.3.2** After the Consent Judgment has been approved, Tower shall provide Brimer's
6 counsel with a 1099 form for its payments to each of the following entities:

7 (a) **Office of Environmental Health Hazard Assessment**, P.O. Box 4010,
8 Sacramento, CA 95814 (EIN: 68-0284486) for the \$3,000 civil penalty payment to OEHHA;

9 (b) **Russell Brimer**, whose address and tax identification number shall be
10 furnished upon request, after this Consent Judgment has been fully executed by the Parties, for the
11 \$1,000 civil penalty payment; and

12 (c) **The Chanler Group** (EIN: 94-3171522) for fees and costs reimbursed in the
13 amount of \$35,000.

14 **3.3.3** All payments and tax documents required by this Consent Judgment shall be
15 delivered to the following address:

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

19 **4. CLAIMS COVERED AND RELEASED**

20 **4.1 Brimer's Public Release of Proposition 65 Claims**

21 Brimer, acting on his own behalf and in the public interest, releases Tower from all claims
22 for violations of Proposition 65 up through the Effective Date based on exposures to the Listed
23 Chemical from the Products as set forth in the Notice. Compliance with the terms of this Consent
24 Judgment constitutes compliance with Proposition 65 with respect to exposures to the Listed
25 Chemical from the Products as set forth in the Notice.

26 **4.2 Brimer's Individual Release of Claims**

27 Brimer, in his individual capacity only and not in his representative capacity, also provides a
28 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all

1 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
2 liabilities and demands of any nature, character or kind, whether known or unknown, suspected or
3 unsuspected, limited to and arising out of alleged or actual exposures to the Listed Chemical in the
4 Products manufactured, distributed or sold by Tower.

5 **4.3 Tower's Release of Brimer**

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

12 **5. COURT APPROVAL**

13 This Consent Judgment is not effective until it is approved and entered by the Court and
14 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
15 after it has been fully executed by the Parties, in which event any monies that have been provided to
16 Brimer or his counsel pursuant to Section 3 above shall be refunded within fifteen (15) days after
17 receiving written notice from Tower that the one-year period has expired.

18 **6. SEVERABILITY**

19 If, subsequent to the execution of this Consent Judgment, any provision is held by a court to
20 be unenforceable, the validity of the remaining provisions shall not be adversely affected.

21 **7. GOVERNING LAW**

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

1 **8. NOTICES**

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

6 For Tower:

7 John Rogers, President
8 Tower Energy Group
9 1983 W. 190th Street, Suite 100
10 Torrance, CA 90504

with a copy to:

11 Stephen Heath, Esq.
12 Fredrickson, Mazeika & Grant, LLP
13 300 Montgomery Street, Suite 410
14 San Francisco, CA 94104

13 For Brimer:

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

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

19 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

23 **10. POST-EXECUTION ACTIVITIES**

24 Brimer agrees to comply with the reporting form requirements referenced in California
25 Health & Safety Code § 25249.7(f). The Parties acknowledge that, pursuant to California Health &
26 Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this Consent
27 Judgment. In furtherance of obtaining such approval, Brimer and Tower and their respective
28 counsel agree to mutually employ their best efforts to support the entry of this agreement as a

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

4 **11. MODIFICATION**

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

8 **12. AUTHORIZATION**

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

11 **AGREED TO:**

AGREED TO:

12
13 Date: 6-15-12

Date: _____

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15 By: 
16 RUSSELL BRIMER

By: _____
John Rogers, President
TOWER ENERGY GROUP

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13 Date: _____

Date: _____

14
15 By: _____
16 RUSSELL BRIMER

By: 
John Rogers, President
TOWER ENERGY GROUP

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