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11 RUSSELL BRIMER

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

15 RUSSELL BRIMER,
16 Plaintiff,
17 v.
18 BIG 5 SPORTING GOODS CORPORATION;
19 and DOES 1-150, inclusive,
20 Defendants.

Case No. RG10546497

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code § 25249.6

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Big 5 Sporting Goods Corporation**

3 This Consent Judgment is entered into by and between Russell Brimer (“Brimer”) and Big 5
4 Corp, erroneously named in the 60-Day Notice and Complaint as Big 5 Sporting Goods Corporation
5 (“Big 5”), with Brimer and Big 5 collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Big 5 employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
13 Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that Big 5 has manufactured, distributed, and/or sold in the State of California
16 accessory sports bag tags containing lead. Lead is listed pursuant to Proposition 65 as chemicals
17 known to the State of California to be reproductive toxicants.

18 **1.5 Products Description**

19 The products that are covered by this Consent Judgment are defined as follows: Accessory
20 Sports bag tags containing lead manufactured, imported, distributed, and/or sold in California by Big
21 5, including but not limited to *Accessory Sports Athletic Bag Tag, Basketball, #03982329* and
22 *Accessory Sports Athletic Bag Tag, Football, #03982345* (“Products”).

23 **1.6 Notices of Violation**

24 On July 1, 2010, Brimer served Big 5 and various public enforcement agencies with a
25 document entitled “60-Day Notice of Violation” (“Notice”) that alleged that Big 5 was in violation of
26 California Health & Safety Code Section 25249.6 for failing to warn consumers that the Products
27 exposed users in California to lead. No public enforcer has diligently prosecuted the allegations set
28 forth in the Notice.

1 **1.7 Complaint**

2 On November 15, 2010, Brimer, who alleges that he was and is acting in the interest of the
3 general public in California, filed a complaint in the Alameda Superior Court (“Complaint”), naming
4 Big 5 as a defendant and alleging violations of Proposition 65 by Big 5 based on the alleged
5 exposures to lead contained in the Products it imported, manufactured, distributed, and/or offered for
6 sale in California.

7 **1.8 No Admission**

8 Big 5 denies the material factual and legal allegations contained in the Notices, Complaint,
9 and First Amended Complaint, and maintains that all of the Products that it has sold in California
10 have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be
11 construed as an admission by Big 5 of any fact, finding, conclusion, issue of law, or violation of law;
12 nor shall compliance with this Consent Judgment constitute or be construed as an admission by Big 5
13 of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by
14 Big 5. However, this section shall not diminish or otherwise affect the obligations, responsibilities,
15 and duties of Big 5 under this Consent Judgment.

16 **1.9 Consent to Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over Big 5 as to the allegations contained in the Complaint, that venue is proper in the
19 County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of this
20 Consent Judgment.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” shall mean June 15, 2011.

23 **2. INJUNCTIVE RELIEF**

24 **2.1 Reformulations Standards**

25 Big 5 asserts that on or about August 18, 2010, it removed the Products from sale in all of its
26 stores and has not shipped the Products for sale, sold or offered to ship the Products for sale in
27 California since that time. Big 5 also asserts that it will not sell or offer to be shipped for sale in
28 California the Products in the future.

1 If Big 5 elects to sell the Products in California on or after the Effective Date, they shall be
2 reformulated to contain no more than 100 parts per million of lead when analyzed pursuant to
3 Environmental Protection Agency (“EPA”) testing methodologies 3050B and 6010B.

4 **3. MONETARY PAYMENTS**

5 **3.1 Payments Pursuant to California Health & Safety Code § 25249.7(b)**

6 Pursuant to Health & Safety Code Section 25249.7(b), the total civil penalty assessed to Big 5
7 shall be \$8,000 to be apportioned in accordance with California Health & Safety Code §§
8 25249.12(c)(1) & (d), with seventy-five percent of the penalty amount remitted to the State of
9 California’s Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
10 twenty-five percent of the penalty paid to Brimer. Big 5 shall issue two separate checks for the
11 penalty payment: (a) one check made payable to “The Chanler Group in Trust for OEHHA” in the
12 amount of \$6,000; and (b) one check payable to “The Chanler Group in Trust for Russell Brimer” in
13 the amount of \$2,000. Two separate 1099s shall be issued for the above-payments: (a) Office of
14 Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-
15 0284486); and (b) Russell Brimer, whose information shall be provided upon request. Payment shall
16 be delivered to Brimer’s counsel on or before June 15, 2011 at the following address:

17 The Chanler Group
18 Attn: Proposition 65 Controller
19 2560 Ninth Street
20 Parker Plaza, Suite 214
21 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 without
25 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
26 issue to be resolved after the material terms of the agreement had been settled. Big 5 then expressed
27 a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized.
28 The Parties then attempted to (and did) reach 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 in this matter, except

1 fees that may be incurred on appeal. Under these legal principles, Big 5 shall pay the amount of
2 \$30,000 for fees and costs incurred as a result of investigating, bringing this matter to Big 5's
3 attention, and negotiating a settlement in the public interest. Big 5 shall issue a separate 1099 for
4 fees and costs (EIN: 94-3171522) and shall make the check payable to "The Chanler Group."
5 Payment shall be delivered on or before June 15, 2011, at the following address:

6 The Chanler Group
7 Attn: Proposition 65 Controller
8 2560 Ninth Street
9 Parker Plaza, Suite 214
10 Berkeley, CA 94710

11 **5. RELEASE OF ALL CLAIMS**

12 **5.1 Brimer's Release of Big 5**

13 In further consideration of the promises and agreements herein contained, and for the
14 payments to be made pursuant to Sections 3.1 and 4.1, Brimer on behalf of himself, his past, and
15 current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the
16 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of
17 legal action and releases all claims including, without limitation, all actions, and causes of action, in
18 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or
19 expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees), of any
20 nature whatsoever (collectively "Claims"), that were brought or could have been brought against Big
21 5, or its parents, subsidiaries, or affiliates, and all of its downstream customers, distributors,
22 wholesalers, retailers, licensors, licensees, or any other downstream person in the course of doing
23 business, and the successors and assigns of any of them, who may use, maintain, manufacture,
24 distribute, advertise, market or sell the Products, and the officers, directors, managers, employees,
25 members, shareholders, agents, insurers and representatives of each of them (collectively
26 "Releasees") in this matter. This release is limited to, but is intended to be a full, final, and binding
27 resolution of, those Claims that arise under Proposition 65, as against Big 5 and the Releasees, as
28 such Claims relate to Big 5's alleged failures to warn about exposures to lead contained in the
Products. Big 5's compliance with this Consent Judgment shall constitute compliance with

1 Proposition 65 for Big 5 and the Releasees with respect to the lead in Products after the Effective
2 Date.

3 Brimer acknowledges that he is familiar with Section 1542 of the California Civil Code,
4 which provides as follows:

5 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**
6 **WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO**
7 **EXIST IN HIS OR HER FAVOR AT THE TIME OF**
8 **EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR**
9 **HER MUST HAVE MATERIALLY AFFECTED HIS**
10 **SETTLEMENT WITH THE DEBTOR.**

11 Brimer, in his individual capacity only and *not* in his representative capacity, expressly
12 waives and relinquishes any and all rights and benefits which he may have under, or which may be
13 conferred on him by the provisions of Section 1542 of the California Civil Code as well as under any
14 other state or federal statute or common law principle of similar effect, to the fullest extent that he
15 may lawfully waive such rights or benefits pertaining to the released matters. In furtherance of such
16 intention, the release hereby given shall be and remain in effect as a full and complete release
17 notwithstanding the discovery or existence of any such additional or different claims or facts arising
18 out of the released matters.

19 The Parties further understand and agree that this release shall not extend upstream to any
20 entities that manufactured the Products for Big 5 or any component parts thereof or to any
21 distributors or suppliers who sold the Products or any component parts thereof to Big 5.

22 **5.2 Big 5's Release of Brimer**

23 Big 5 waives any and all claims against Brimer, his attorneys, and other representatives
24 (collectively, the "Brimer Releasees") for any and all actions taken or statements made (or those that
25 could have been taken or made) by Brimer and his attorneys and other representatives in this matter
26 and/or with respect to the Products, whether in the course of investigating claims or otherwise
27 seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Products.

28 Big 5 also provides a general release to the Brimer Releasees herein, which shall be effective
as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of Big 5 of any nature,

1 character, or kind, known or unknown, suspected or unsuspected, arising out of the subject matter of
2 the Notice or this Consent Judgment. Big 5 acknowledges that it is familiar with Section 1542 of the
3 California Civil Code, which provides as follows:

4 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**
5 **WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO**
6 **EXIST IN HIS OR HER FAVOR AT THE TIME OF**
7 **EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR**
8 **HER MUST HAVE MATERIALLY AFFECTED HIS OR HER**
9 **SETTLEMENT WITH THE DEBTOR.**

8 Big 5 expressly waives and relinquishes any and all rights and benefits which it may have
9 under, or which may be conferred on it by, the provisions of Section 1542 of the California Civil
10 Code as well as under any other state or federal statute or common law principle of similar effect, to
11 the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters.
12 In furtherance of such intention, the release hereby given shall be and remain in effect as a full and
13 complete release notwithstanding the discovery or existence of any such additional or different claims
14 or facts arising out of the released matters.

15 **6. COURT APPROVAL**

16 This Consent Judgment is not effective until it is approved and entered by the Court and shall
17 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
18 has been fully executed by all Parties, in which event any monies that have been provided to Brimer
19 or his counsel pursuant to Sections 3.1 and/or Section 4.1 above shall be refunded within fifteen (15)
20 days after receiving written notice from Big 5 that the one-year period has expired and the Consent
21 Judgment has not been approved by the Court.

22 **7. SEVERABILITY**

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

26 **8. GOVERNING LAW**

27 The terms of this Consent Judgment shall be governed by the laws of the State of California
28 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is

1 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Big 5 may
2 provide written notice to Brimer of any asserted change in the law, and shall have no further
3 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
4 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Big 5 from any
5 obligation to comply with any pertinent state or federal toxics control laws.

6 **9. NOTICES**

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

11 For Big 5:

12 Gary Meade, Senior Vice President and General Counsel
13 Big 5 Corp.
14 2525 East El Segundo Boulevard
15 El Segundo, CA 90245

16 With copies to:

17 Carol Brophy, Esq.
18 Sedgwick, Detert, Moran & Arnold LLP
19 One Market Plaza, 8th Floor
20 San Francisco, CA 94105

21 For Brimer:

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

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

29 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

1 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

2 Brimer agrees to comply with the reporting form requirements referenced in California Health
3 & Safety Code § 25249.7(f).

4 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

5 The Parties acknowledge that, pursuant to California Health & Safety Code § 25249.7, a
6 noticed motion is required to obtain judicial approval of this Consent Judgment. In furtherance of
7 obtaining such approval, Brimer and Big 5 and their respective counsel agree to mutually employ
8 their "best efforts" to support the entry of this agreement as a Consent Judgment and obtain approval
9 of the Consent Judgment by the Court in a timely manner. For purposes of this section, "best efforts"
10 shall include, at a minimum, cooperating on the drafting and filing of any papers in support of the
11 required motion for judicial approval.

12 **13. MODIFICATION**

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

16 **14. INTEGRATION CLAUSE**

17 This Consent Judgment contains the complete agreement of the Parties; there is no other
18 agreement, express or implied.

19 **15. AUTHORIZATION**

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

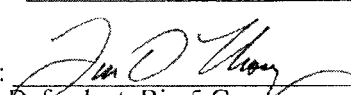
22 **AGREED TO:**

AGREED TO:

23
24 Date: 6-2-11

Date: 06-02-11

25
26 By: 
Plaintiff, Russell Brimer

By: 
Defendant, Big 5 Corp

27
28