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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR OF COUNTY OF ALAMEDA

10
11 RUSSELL BRIMER

12 Plaintiff,

13 v.

14 TOFASCO OF AMERICA, INC.;
15 MACSPORTS, INC.; and DOES 1 through 150,
inclusive,

16 Defendants.

CASE NO. RG11575589

[PROPOSED] CONSENT JUDGMENT

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CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Consent Judgment is entered into by and between Plaintiff Russell Brimer (“Plaintiff”)
4 and Defendant Tofasco of America, Inc. (“Defendant”), with Plaintiff and Defendant collectively
5 referred to as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Defendant employs 10 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 &
13 Safety Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Plaintiff alleges that Defendant has manufactured, distributed, and/or sold, in the State of
16 California, folding chairs that expose users to lead, without first providing “clear and reasonable
17 warnings” under Proposition 65. Lead is listed as a reproductive and developmental toxicant
18 pursuant to Proposition 65 and is referred to hereinafter as the “Listed Chemical.” Folding chairs
19 containing lead and sold by the Defendant are referred to herein as the “Product” or “Products.”

20 **1.5 Notice of Violation**

21 On February 1, 2011, Plaintiff served Defendant and various public enforcement agencies
22 with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided public enforcers
23 and Defendant with notice of alleged violations of Health & Safety Code § 25249.6 for failing to
24 warn consumers that the Products that Defendant manufactured, distributed and/or sold exposed
25 users in California to lead.

26 **1.6 Complaint**

27 On May 13, 2011, Plaintiff, acting in the interest of the general public in California, filed a
28 Complaint the instant action in the Superior Court for the County of Alameda, Case No.

1 RG11575589, alleging violations of Health & Safety Code § 25249.6 based on the alleged exposures
2 to lead contained in the Products manufactured, distributed, and/or sold by Defendant (the
3 “Complaint”).

4 **1.7 No Admission**

5 This Consent Judgment resolves claims that are denied and disputed by Defendant. The
6 Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
7 between the Parties for the purpose of avoiding prolonged litigation. Defendant denies the material,
8 factual, and legal allegations contained in the Notice and Complaint and maintains that the Products
9 it has manufactured, distributed and/or sold in California have been, and are, in compliance with all
10 applicable laws. Nothing in this Consent Judgment shall be construed as an admission by Defendant
11 of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this
12 Consent Judgment constitute or be construed as an admission by Defendant of any fact, finding,
13 conclusion, issue of law, or violation of law, such being specifically denied by Defendant. However,
14 this Section shall not diminish or otherwise affect Defendant’s obligations, responsibilities, and
15 duties under this Consent Judgment.

16 **1.8 Consent to Jurisdiction**

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

21 **1.9 Effective Date**

22 For the purposes of this Consent Judgment, the term “Effective Date” shall mean ten (10)
23 days after the Court enters an order granting approval of this Consent Judgment.

24 **2. INJUNCTIVE RELIEF**

25 **2.1 Reformulated Products**

26 As of the Effective Date, subject to paragraph 2.2 below, Defendant shall not import,
27 manufacture, or supply to an unaffiliated third party any Product that will be sold or offered for sale
28 to consumers in California unless such Product contains no more than 100 parts per million (“ppm”)

1 of the Listed Chemical when analyzed pursuant to Environmental Protection Agency testing
2 methodologies 3050B and 6010B, or equivalent methodologies utilized by federal or state agencies
3 for the purpose of determining lead content in a solid substance. "Reformulated Products" are
4 defined as those Products that contain no more than 100 ppm lead content when analyzed pursuant to
5 the methodologies described in this section.

6 **2.2 Product Warnings**

7 Commencing on the Effective Date, Defendant shall, for all Products sold, manufactured, or
8 supplied by Defendant to consumers in California after the Effective Date that are not Reformulated
9 Products, provide a clear and reasonable warning as set forth in subsections 2.2(a) and (b) below.
10 Such labeling is not in any manner required for Reformulated Products. Each warning shall be
11 prominently placed with such conspicuousness as compared with other words, statements, designs,
12 or devices as to render it likely to be read and understood by an ordinary individual under customary
13 conditions before purchase or use. Each warning shall be provided in a manner such that the
14 consumer or user understands to which *specific* Product the warning applies, so as to minimize the
15 risk of consumer confusion. The Parties agree and understand that until the factories have exhausted
16 their existing inventory of warning labels, the following language may be used and shall not be a
17 violation of this Consent Judgment:

18
19 **CA PROP 65 WARNING:** This product contains chemicals, including lead, known to the
20 State of California to cause cancer and birth defects or other
21 reproductive harm.

22 23 **(a) Product Labeling.**

24 **(i) Product Labeling.** Defendant may affix a warning to the packaging,
25 labeling, or directly on each Product sold by Defendant to customers in California with the following
26 warning statement:

27 **WARNING:** This product contains lead, a chemical known to
28 the State of California to cause cancer and birth
defects or other reproductive harm.

1 (ii) **Point-of-Sale Warnings.** Alternatively, Defendant may provide
2 warning signs with the warning statement below to its retailers known by Defendant to sell to
3 consumers in California with instructions to post the warnings in close proximity to the point of
4 display of the Products.

5 **WARNING:** This product contains lead, a chemical known
6 to the State of California to cause cancer and
7 birth defects or other reproductive harm.

8 (b) **Mail Order Catalog and Internet Sales.** In the event that Defendant sells
9 Products via mail order catalog or internet to customers located in California after the Effective Date
10 that are not Reformulated Products, Defendant shall provide a warning for Products sold via mail
11 order catalog or the Internet to California residents: (1) in the mail order catalog; or (2) on the
12 website. Warnings given in the mail order catalog or on the website shall identify the *specific*
13 Product to which the warning applies as further specified in Sections 2.2(b)(i) and (ii).

14 (i) **Mail Order Catalog Warning.** Any warning provided in a mail order
15 catalog must be in the same type size or larger than the Product description text within the catalog.
16 A warning with the warning statement below shall be provided on the same page and in the same
17 location as the display and/or description of the Product:

18 **WARNING:** This product contains lead, a chemical known
19 to the State of California to cause cancer and
20 birth defects or other reproductive harm.

21 Where it is impracticable to provide the warning on the same page and in the same location
22 as the display and/or description of the Product, Defendant, may utilize a designated symbol to cross
23 reference the applicable warning and shall define the term "designated symbol" with the language
24 below on the inside of the front or rear cover of the catalog or on the same page as any order form
25 for the Product(s):

26 **WARNING:** Certain products identified with this symbol
27 ▼ and offered for sale in this catalog contain
28 lead, a chemical known to the State of
California to cause cancer and birth defects or
other reproductive harm.

1 The designated symbol must appear on the same page and in close proximity to the display and/or
2 description of the Product. On each page where the designated symbol appears, Defendant must
3 provide a header or footer directing the consumer to the warning language and definition of the
4 designated symbol.

5 If Defendant elects to provide warnings in the mail order catalog, then the warnings must be
6 included in all catalogs distributed in California and offering to sell one or more Products printed
7 after the Effective Date.

8 (ii) **Internet Website Warnings.** A warning may be given in conjunction
9 with the sale of the Products via the Internet, provided it appears either: (a) on the same web page
10 on which a Product is displayed; (b) on the same web page as the order form for a Product; (c) on the
11 same page as the price for any Product; or (d) on one or more web pages or pop-up windows
12 displayed to a purchaser during the product review or checkout process. A warning statement shall
13 be used and shall appear in any of the above instances adjacent to or immediately following the
14 display, description, or price of the Product for which it is given in the same type size or larger than
15 the Product description text:

16 **WARNING:** This product contains lead, a chemical known
17 to the State of California to cause cancer and
18 birth defects or other reproductive harm.

19 Alternatively, the designated symbol may appear adjacent to or immediately following the
20 display, description, or price of the Product for which a warning is being given, provided that a
21 warning statement below also appears elsewhere on the same web page or on one or more web pages
22 or pop-up windows displayed as a result of clicking on the designated symbol, as follows:

23 **WARNING:** Products identified on this page with the
24 following symbol ▼ contain lead, a chemical
25 known to the State of California to cause
26 cancer and birth defects or other reproductive
27 harm.

28 **3. MONETARY PAYMENTS**

3.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)

Defendant shall be assessed an initial civil penalty of \$2,000. Defendant shall make a

1 payment of \$1,500, to be apportioned in accordance with Health & Safety Code section 25249.12,
2 subdivisions (c)(1) and (d), with 75% of these funds earmarked for the State of California's Office
3 of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of these penalty
4 monies in the amount of \$500 earmarked for Plaintiff.

5 **3.1.1 Abatement of Civil Penalty for Reformulation**

6 Defendant will be assessed a second penalty in the amount of \$4,000, unless, within one
7 year of the Effective Date of this agreement, Defendant certifies Defendant shall not import,
8 manufacture, or supply to an unaffiliated third party any Product that will be sold or offered for
9 sale to consumers in California unless such Product contains no more than 100 parts per million
10 ("ppm") of the Listed Chemical when analyzed pursuant to Environmental Protection Agency
11 testing methodologies 3050B and 6010B, or equivalent methodologies utilized by federal or
12 state agencies for the purpose of determining lead content in a solid substance. Defendant shall
13 make a payment of \$3,000, to be apportioned in accordance with Health & Safety Code section
14 25249.12, subdivisions (c)(1) and (d), with 75% of these funds earmarked for the State of
15 California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining
16 25% of these penalty monies in the amount of \$1,000 earmarked for Plaintiff.

17 **3.2 Reimbursement of Plaintiff's Fees and Costs**

18 The Parties acknowledge that Plaintiff and his counsel offered to resolve this dispute
19 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
20 this fee issue to be resolved after the material terms of the agreement had been settled. Defendant
21 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
22 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to
23 Plaintiff and his counsel under general contract principles and the private attorney general doctrine
24 codified at California Code of Civil Procedure section 1021.5, for all work performed in this matter,
25 except fees that may be incurred on appeal. Under these legal principles, Defendant shall pay the
26 amount of \$30,000 for fees and costs incurred investigating, litigating and enforcing this matter,
27 including the fees and costs incurred (and yet to be incurred) negotiating, drafting, and obtaining
28 the Court's approval of this Consent Judgment in the public interest.

1 **3.3 Payment Procedures**

2 **3.3.1 Funds Held In Trust:** All payments required by Sections 3.1 and 3.2 shall
3 be delivered within 5 days of the execution of this Consent Judgment, to either The Chanler Group
4 or the attorney of record for the Defendant, and shall be held in trust pending the Court’s approval
5 of this Consent Judgment.

6 Payments delivered to The Chanler Group shall be made payable, as follows:

- 7 (a) One check made payable to “The Chanler Group in Trust for
8 OEHHA” in the amount of \$1,500;
- 9 (b) One check made payable to “The Chanler Group in Trust for
10 Plaintiff” in the amount of \$500; and
- 11 (c) One check made payable to “The Chanler Group in Trust” in the
12 amount of \$30,000.

13 Payments delivered to Hunton & Williams, LLP shall be made payable, as follows:

- 14 (a) One check made payable to “Hunton & Williams, LLP in Trust for
15 OEHHA” in the amount of \$1,500;
- 16 (b) One check made payable to “Hunton & Williams, LLP in Trust for
17 Plaintiff” in the amount of \$500; and
- 18 (c) One check made payable to “Hunton & Williams, LLP in Trust for
19 The Chanler Group” in the amount of \$30,000.

20 If Defendant elects to deliver payments to its attorney of record, such attorney of record
21 shall: (a) confirm in writing within five days of receipt that the funds have been deposited in a trust
22 account; and (b) within two days of the date of the hearing on which the Court approves the
23 Consent Judgment, deliver the payment to The Chanler Group in three separate checks, as follows:

- 24 (a) One check made payable to “The Chanler Group in Trust for
25 OEHHA” in the amount of \$1,500;
- 26 (b) One check to “The Chanler Group in Trust for Plaintiff” in the
27 amount of \$500; and
- 28 (c) One check to “The Chanler Group” in the amount of \$30,000.

1 **3.3.2 Issuance of 1099 Forms.** After the Consent Judgment has been approved
2 and the settlement funds have been transmitted to plaintiff's counsel, Defendant shall issue three
3 separate 1099 forms, as follows:

4 (a) The first 1099 shall be issued to the Office of Environmental Health Hazard
5 Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of \$1,500;

6 (b) The second 1099 shall be issued to Plaintiff in the amount of \$500 whose
7 address and tax identification number shall be furnished upon request; and

8 (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-3171522) in
9 the amount of \$30,000.

10 **3.3.3 Payment Address:** All payments to the Chanler Group shall be delivered to
11 the following payment address:

12 The Chanler Group
13 Attn: Proposition 65 Controller
14 2560 Ninth Street
15 Parker Plaza, Suite 214
16 Berkeley, CA 94710

17 **4. CLAIMS COVERED AND RELEASED**

18 **4.1 Plaintiff's Public Release of Proposition 65 Claims.**

19 Plaintiff acting on his own behalf and in the public interest releases Defendant, its parents,
20 subsidiaries, affiliated entities that are under common ownership, and including MacSports Inc.,
21 and directors, officers, employees, attorneys, and each entity to whom they directly or indirectly
22 distribute or sell the Products, including but not limited to downstream distributors, wholesalers,
23 customers, retailers, franchisees, cooperative members, licensors, and licensees (collectively,
24 "Releasees") from all claims for violations of Proposition 65 up through the Effective Date based
25 on exposure to the Listed Chemical from the Products as set forth in the Notice. Compliance with
26 the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
27 exposures to the Listed Chemical from the Products as set forth in the Notice.
28

1 **4.2 Plaintiff's Individual Release of Claims.**

2 Plaintiff also, in his individual capacity only and *not* in his representative capacity, provides
3 a release herein to Defendant and Releasees which shall be effective as a full and final accord and
4 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
5 damages, losses, claims, liabilities and demands of Plaintiff of any nature, character or kind,
6 whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or
7 actual exposures to the Listed Chemical in the Products manufactured, distributed or sold by
8 Defendant and Releasees.

9 **4.3 Defendant's Release of Plaintiff.**

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

16 **5. COURT APPROVAL**

17 This Consent Judgment is not effective until it is approved and entered by the Court and shall
18 be null and void if, for any reason, it is not approved and entered by the Court within one year after
19 it has been fully executed by all Parties. In the event this Consent Judgment is entered by the Court
20 and subsequently overturned by any appellate court, any monies that have been provided to Plaintiff
21 or his counsel pursuant to Sections 3 and/or 4 above shall be refunded within fifteen (15) days after
22 receiving a written demand from Defendant requesting the return of such funds, plus interest at the
23 rate set by Cal. Code Civ. Proc. § 685.030, and calculated as commencing on the date that payment
24 was made by Defendant.

25 **6. SEVERABILITY**

26 If, subsequent to Court approval of this Consent Judgment, any of the provisions of this
27 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
28

1 remaining shall not be adversely affected unless the Court finds that any unenforceable provision is
2 not severable from the remainder of the Consent Judgment.

3 **7. GOVERNING LAW**

4 The terms of this Consent Judgment shall be governed by the laws of the State of California.
5 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by
6 reason of law generally, or as to the Listed Chemical and/or the Products, then Defendant shall have
7 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
8 Products are so affected.

9 **8. NOTICES**

10 When any Party is entitled to receive any notice under this Consent Judgment, the notice
11 shall be in writing via electronic mail and sent to the person(s) identified below by (i) first-class
12 registered or certified mail, return receipt requested; or (ii) overnight courier; or (ii) personal service
13 at the following addresses:

14 To Defendant:

15 Malcolm Weiss, Esq.
16 Diana Biason, Esq.
17 Hunton & Williams, LLP
18 550 South Hope Street
19 Suite 2000
Los Angeles, CA 90071
mweiss@hunton.com
dbiason@hunton.com

20 With Copy to:

21 Bobby Chao
22 Administration -- Legal
23 1661 Fairplex Drive
La Verne, CA 91750
babby.chao@tofasco.com

24 To Plaintiff:

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

1 Any Party may modify the person and address to whom the notice is to be sent via the
2 methods described in this section.

3 **9. POST EXECUTION ACTIVITIES**

4 Plaintiff agrees to comply with the reporting form requirements referenced in California
5 Health & Safety Code §25249.7(f). The Parties acknowledge that, pursuant to California Health &
6 Safety Code § 25249.7, Plaintiff must bring a noticed motion to obtain judicial approval of this
7 Consent Judgment. In furtherance of obtaining such approval, the Parties, and their respective
8 counsel agree to mutually employ their best efforts to support the entry of this agreement as a
9 Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely manner.
10 For purposes of this paragraph, “best efforts” shall include providing necessary information for the
11 filing of any papers to obtain judicial approval of this Consent Judgment and refraining from
12 objecting to the Consent Judgment.

13 **10. MODIFICATION**

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

17 **11. ENTIRE AGREEMENT**

18 This Consent Judgment contains the sole and entire agreement and understanding of the
19 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
20 negotiations, commitments, and understandings related hereto. No representations, oral or otherwise,
21 express or implied, other than those contained herein have been made by any party hereto. No other
22 agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind
23 any of the Parties.

24 **12. ATTORNEYS’ FEES**

25 A Party who unsuccessfully brings or contests an action arising out of this Consent Judgment
26 shall be required to pay the prevailing Party’s reasonable attorneys’ fees and costs unless the
27 unsuccessful Party has acted with substantial justification.
28

1 **13. COUNTERPARTS, FACSIMILE SIGNATURES**

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

5 **14. AUTHORIZATION**

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

8

9 **AGREED TO:**

AGREED TO:

10


11 Date: 5-18-12

Date: 05-15-2012

12

13

14 By: 
Plaintiff Russell Brimer

By: 
Its: Edward Zheng/CEO
Tofasco of America Inc.

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