

1 Laralei Paras, State Bar No. 203319
Josh Voorhees, State Bar No. 241436
2 THE CHANLER GROUP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710-2565
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

5
6 Attorneys for Plaintiff
RUSSELL BRIMER

7 George J. Gigounas, State Bar No. 209334
8 DLA PIPER LLP
555 Mission St., Ste 2400
9 San Francisco, CA 94105
Telephone: (415) 615-6005
10 Facsimile: (415) 659-7305

11 Attorneys for Defendant
12 ZEBRA PEN CORP.

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

17 RUSSELL BRIMER,) Case No.: RG12659297
18)
19 Plaintiff,)
20 v.) **[PROPOSED]**
21 ZEBRA PEN CORP.; *et al.*,) **CONSENT JUDGMENT**
22 Defendant.)
_____)

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Zebra Pen Corp.**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer”) and Zebra Pen Corp. (“Zebra”), with Brimer and Zebra collectively referred to as the “parties,” and individually as a “party.” Brimer is an individual residing in the State of California who has asserted that he seeks to promote awareness of exposure to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer and commercial products. Brimer alleges that Zebra employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6, *et seq.* (“Proposition 65”).

11 **1.2 General Allegations**

12 Brimer alleges that Zebra has manufactured, imported, distributed and/or sold pencils with erasers that contain di(2-ethylhexyl)phthalate (“DEHP”) without the requisite Proposition 65 warnings. DEHP is on the Proposition 65 list as known to cause birth defects and other reproductive harm.

16 **1.3 Product Description**

17 As used in this Consent Judgment, “Products” shall mean pencils with erasers containing DEHP including, but not limited to, *Zebra Cadoodles Mechanical Pencil* (#0 45888 51211 5), manufactured, imported, distributed and/or sold by Zebra for sale in the State of California.

20 **1.4 Notice of Violation**

21 On March 8, 2012, Brimer served Zebra and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided recipients with notice alleging that Zebra was in violation of Proposition 65 for failing to warn consumers and customers that the Products exposed users in California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

26 **1.5 Complaint**

27 On or about December 11, 2012, Brimer filed a complaint in the Superior Court in and for the County of Alameda against American Zebra Pen Corp. and Does 1 through 150, *Brimer v.*

1 *Zebra Pen Corp., et al.*, Case No. RG12659297, alleging violations of Proposition 65, based on the
2 alleged exposures to DEHP contained in certain pencils with erasers sold by Zebra (“Complaint”).

3 **1.6 No Admission**

4 Zebra denies the material, factual and legal allegations contained in Brimer’s Notice and
5 Complaint and maintains that it has at all times been in compliance with all laws and all products
6 that it has sold, manufactured, imported and/or distributed in California, including the Products.
7 Nothing in this Consent Judgment shall be construed as an admission by Zebra of any fact, finding,
8 issue of law or violation of law, nor shall compliance with this Consent Judgment constitute or be
9 construed as an admission by Zebra of any fact, finding, conclusion, issue of law or violation of
10 law. However, this Section shall not diminish or otherwise affect Zebra’s obligations,
11 responsibilities and duties under this Consent Judgment.

12 **1.7 Consent to Jurisdiction**

13 For purposes of this Consent Judgment only, the parties stipulate that this Court has
14 jurisdiction over Zebra as to the allegations contained in the Complaint, that venue is proper in the
15 County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of this
16 Consent Judgment.

17 **1.8 Execution Date**

18 For purposes of this Consent Judgment, the term “Execution Date” shall mean the date this
19 Consent Judgment is signed by both parties.

20 **1.9 Effective Date**

21 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date the
22 Court enters Judgment pursuant to the terms of this Consent Judgment.

23 **2. INJUNCTIVE RELIEF: REFORMULATION**

24 **2.1 Reformulation Standard**

25 As of the Effective Date, Zebra shall only manufacture, produce, assemble, import,
26 distribute, ship, sell or offer to be shipped for sale in California Products that qualify as
27 Reformulated Products. Reformulated Products are Products containing DEHP in concentrations
28 of less than 0.1 percent (1,000 parts per million) in each accessible component when analyzed

1 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or
2 any other methodology utilized by federal or state agencies for the purpose of determining DEHP
3 content in a solid substance.

4 **3. MONETARY PAYMENTS**

5 **3.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

6 Zebra shall pay a total civil penalty payment of \$24,800 under this Section, as follows:

7 **3.1.1 Initial Civil Penalty.** Zebra shall pay an initial civil penalty of \$6,500
8 within five (5) days of the Execution Date, as provided by Section 3.3.1. The initial civil penalty
9 shall be apportioned in accordance with California Health & Safety Code § 25249.12 (c) and (d),
10 with 75% of these funds remitted to the State of California’s Office of Environmental Health
11 Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to Brimer.

12 **3.1.2 Final Civil Penalty.** Zebra shall pay a final civil penalty of \$14,800 on or
13 before July 31, 2013, as provided by Section 3.3.2. The final civil penalty shall be waived in its
14 entirety, however, if an officer of Zebra provides Brimer with written certification that, as of the
15 Execution Date and continuing into the future, Zebra has met the Reformulation Standard specified
16 in Section 2.1 above such that all Products manufactured, produced, assembled, imported,
17 distributed, shipped, sold or offered to ship for sale in California are Reformulated Products.
18 Brimer must receive any such certification on or before July 15, 2013, and time is of the essence.
19 The final civil penalty shall also be apportioned in accordance with California Health & Safety
20 Code § 25249.12 (c) and (d), with 75% of these funds remitted to OEHHA and the remaining 25%
21 of the penalty remitted to Brimer.

22 **3.1.3 Payment in Lieu of Civil Penalty.** Zebra shall pay the sum of \$3,500 to
23 Silent Spring Institute (“Silent Spring”), a not-for-profit institution, in lieu of further civil fines
24 pursuant to California Health & Safety Code § 25249.7(b), and California Code of Regulations,
25 Title 11, § 3202(b). Silent Spring will use such funds in one or more of the following ways: (a) to
26 continue its work identifying the links between exposure to environmental chemicals including
27 lead, DEHP and other phthalates such as di-n-butyl (“DBP”) and butyl benzyl phthalate (“BBP”)
28 and reproductive and developmental harm, as well as educating the public about such potential

1 exposures; (b) to conduct exposure- and risk-based prioritization of chemicals listed under
2 Proposition 65, or chemicals OEHHA has identified as candidates for listing, in order to identify
3 exposures of potential public health significance; (c) to monitor compliance with the reformulation
4 requirements of this and other, similar consent judgments addressing Proposition 65-listed chemical
5 exposures; or (d) to conduct additional exposure measurements that evaluate the levels of chemical
6 exposures to users of products that contain lead, DEHP, DBP and BBP.

7 **3.2 Reimbursement of Brimer's Fees and Costs**

8 The parties acknowledge that Brimer and his counsel offered to resolve this dispute
9 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
10 this fee issue to be resolved after the material terms of the agreement had been settled. Zebra then
11 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
12 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due
13 to Brimer and his counsel under general contract principles and the private attorney general
14 doctrine codified at California Code of Civil Procedure § 1021.5, for all work performed in this
15 matter, except fees that may be incurred on appeal. Under these legal principles, Zebra shall pay
16 the amount of \$34,500 for fees and costs incurred investigating, litigating and enforcing this
17 matter, including the fees and costs incurred (and yet to be incurred) negotiating, drafting, and
18 obtaining the Court's approval of this Consent Judgment in the public interest.

19 **3.3 Payment Procedures**

20 **3.3.1 Initial Payments.** All payments required by Sections 3.1.1 and 3.2 shall be
21 within five (5) days of the Execution Date, in three checks made payable as follows:

- 22 (a) one check to "OEHHA" in the amount of \$4,875;
- 23 (b) one check to "The Chanler Group in Trust for Russell Brimer" in the
24 amount of \$1,625;
- 25 (c) one check to "The Chanler Group in Trust for Silent Spring Institute"
26 in the amount of \$3,500; and
- 27 (d) one check to "The Chanler Group" in the amount of \$34,500.

28 ///

1 **3.3.2 Final Civil Penalty Payments.** If the final civil penalty referenced in
2 Section 3.1.2 above is not waived, payments shall be made payable in two checks as follows:

- 3 (a) one check to “OEHHA” in the amount of \$11,100; and
4 (b) one check to “The Chanler Group in Trust for Russell Brimer” in the
5 amount of \$3,700.

6 **3.3.3 Issuance of 1099 Forms.** After the settlement funds have been transmitted
7 to Brimer’s counsel, Zebra shall issue separate 1099 forms, as follows:

- 8 (a) one 1099 form to the “Office of Environmental Health Hazard
9 Assessment” (EIN: 68-0284486) in the amount of \$4,875;
10 (b) a second 1099 form to “Russell Brimer” in the amount of \$1,625,
11 whose address and tax identification number shall be furnished upon
12 request;
13 (c) a third 1099 form to “Silent Spring Institute,” 29 Crafts Street,
14 Newton, Massachusetts 02458, whose information shall be provided
15 by email or other means within five (5) calendar days of the final
16 execution of this agreement, in the amount of \$3,500;
17 (d) a fourth 1099 to “The Chanler Group” (EIN: 94-3171522) in the
18 amount of \$34,500;
19 (e) If the penalty referenced in Section 3.1.2 above is paid, a fifth 1099
20 shall be issued to the “Office of Environmental Health Hazard
21 Assessment” in the amount of \$11,100; and
22 (f) If the penalty referenced in Section 3.1.2 above is paid, a sixth 1099
23 shall be issued to “Russell Brimer” in the amount of \$3,700.

24 **3.3.4 Issuance of Payments.**

25 **3.3.4.1** All payments owed to Brimer and the Silent Spring Institute,
26 pursuant to Sections 3.1 through 3.2, shall be delivered to the following payment address:

27 The Chanler Group
28 Attn: Proposition 65 Controller
 2560 Ninth Street, Suite 214
 Berkeley, CA 94710

1 **3.3.4.2** All payments owed to OEHHA (EIN: 68-0284486), pursuant to
2 Sections 3.1 through 3.2, shall be delivered directly to OEHHA (Memo line “Prop 65 Penalties”)
3 at the following addresses:

4 For United States Postal Service Delivery:

5 Mike Gyrics
6 Fiscal Operations Branch Chief
7 Office of Environmental Health Hazard Assessment
8 P.O. Box 4010
9 Sacramento, CA 95812-4010

10 For Non-United States Postal Service Delivery:

11 Mike Gyrics
12 Fiscal Operations Branch Chief
13 Office of Environmental Health Hazard Assessment
14 1001 I Street
15 Sacramento, CA 95814

16 With a copy of the checks payable to OEHHA mailed to The Chanler Group at the address set forth
17 above in 3.3.1(a), as proof of payment to OEHHA.

18 **4. CLAIMS COVERED AND RELEASED**

19 **4.1 Brimer’s Release of Zebra**

20 Plaintiff, acting on his own behalf and in the public interest, releases Zebra, its parents,
21 subsidiaries, affiliated entities that are under common ownership, directors, officers, employees,
22 attorneys, and each entity to whom Zebra directly or indirectly distributes or sells Products,
23 including, but not limited to, downstream distributors, wholesalers, customers, retailers,
24 franchisees, cooperative members, licensors, and licensees (“Releasees”), from all claims for
25 violations of Proposition 65 up through the date on which this Consent Judgment is signed by both
26 parties based on exposure to DEHP from the Products as set forth in the Notice. Compliance with
27 the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
28 exposures to DEHP from the Products as set forth in the Notice.

 Brimer, also, in his individual capacity only and *not* in his representative capacity, provides
a release 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,

1 liabilities and demands of Brimer of any nature, character or kind, whether known or unknown,
2 suspected or unsuspected, limited to and arising out of alleged or actual exposures to the DEHP in
3 the Products manufactured, distributed or sold by Zebra.

4 **4.2 Zebra's Release of Brimer**

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

11 **5. COURT APPROVAL**

12 This Consent Judgment is not effective until it is approved and entered by the Court and
13 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
14 after it has been fully executed by all parties. In the event the Court does not approve this Consent
15 Judgment within one year, the funds paid pursuant to Section 3 of this Consent Judgment shall be
16 returned to Zebra.

17 **6. SEVERABILITY**

18 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
19 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
20 provisions remaining 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 the obligations of Zebra hereunder as to the Products apply only within the State of California.
24 In the event that Proposition 65 is repealed, preempted or is otherwise rendered inapplicable by
25 reason of law generally, or if any of the provisions of this Consent Judgment are rendered
26 inapplicable or no longer required as a result of any such repeal or preemption or rendered
27 inapplicable by reason of law generally as to the Products, including, without limitation, the
28 removal of DEHP from OEHHA's list of Proposition 65 chemicals, then Zebra shall notify Brimer

1 and his counsel and may have no further obligations pursuant to this Consent Judgment with
2 respect to, and to the extent that, the Products are so affected.

3 **8. NOTICES**

4 Unless specified herein, all correspondence and notices required to be provided pursuant to
5 this Consent Judgment shall be in writing and (i) personally delivered, (ii) sent by first-class,
6 (registered or certified mail) return receipt requested, or (iii) sent by overnight courier to one party
7 from the other party at the following addresses:

8 To Zebra:

9 Clem Restaino, President
10 Zebra Pen Corp.
11 242 Raritan Center Parkway
12 Edison, NJ 08837

To Brimer:

Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

12 With a copy to:

13 George J. Gigounas, Esq.
14 DLA Piper LLP
15 555 Mission St., Ste 2400
16 San Francisco, CA 94105

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

19 **9. COUNTERPARTS; FACSIMILE/PDF SIGNATURES**

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

23 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

24 Brimer and his attorneys agree to comply with the reporting form requirements referenced
25 in California Health & Safety Code § 25249.7(f).

26 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

27 Brimer and Zebra agree to mutually employ their, and their counsel's, best efforts to
28 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
Judgment by the Court in a timely manner. The parties acknowledge that, pursuant to California
Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this

1 Consent Judgment, which Brimer shall draft and file, and Zebra shall not oppose. If any third party
2 objection to the noticed motion is filed, Brimer and Zebra shall work together to file a joint reply
3 or separate replies if the parties so desire and appear at any hearing before the Court. This
4 provision is a material component of the Consent Judgment and shall be treated as such in the
5 event of a breach. If the Court does not grant the motion to approve this Consent Judgment, and if
6 the parties choose not to pursue a modified Consent Judgment within 30 days after the Court's
7 denial of the motion to approve, then, upon remittitur, any and all payments made pursuant to
8 Section 3 of this Consent Judgment will be returned to Zebra.

9 **12. MODIFICATION**

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

13 **13. AUTHORIZATION**

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

16 AGREED TO:

AGREED TO:

17
18 Date: 2-19-13

Date: _____

19
20 By:  _____
Plaintiff, Russell Brimer

By: _____
Clem Restaino, President
Defendant, Zebra Pen Corp.

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2 objection to the noticed motion is filed, Brimer and Zebra shall work together to file a joint reply
3 or separate replies if the parties so desire and appear at any hearing before the Court. This
4 provision is a material component of the Consent Judgment and shall be treated as such in the
5 event of a breach. If the Court does not grant the motion to approve this Consent Judgment, and if
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15 understood, and agree to all of the terms and conditions of this Consent Judgment.


16 AGREED TO:

AGREED TO:

17
18 Date: _____

Date: 2/19/2013

19
20 By: _____
21 Plaintiff, Russell Brimer

By: 
22 Clem Restaino, President
23 Defendant, Zebra Pen Corp.
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