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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,
Plaintiff,
v.
R. R. DONNELLEY & SONS COMPANY; *et al.*,
Defendants.

Case No. RG12636902
[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 plaintiff, Russell Brimer
4 (“Brimer”), and defendant, R. R. Donnelley & Sons Company (“Donnelley”), with Brimer and
5 Donnelley each individually referred to as a “Party” and collectively as the “Parties.”

6 **1.2. Plaintiff**

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

10 **1.3. Defendant**

11 Donnelley 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, Health & Safety Code
13 § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4. General Allegations**

15 Brimer alleges that Donnelley sold coverings for books containing di(2-
16 ethylhexyl)phthalate (“DEHP”) without first providing the clear and reasonable warning required
17 by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the state of
18 California to cause birth defects or other reproductive harm.

19 **1.5. Product Description**

20 The products that are covered by this Consent Judgment are: (a) coverings for books
21 containing DEHP, including but not limited to, the *Adams Waterproof Vinyl Jacket, AFR13 (#0*
22 *87958 16813 6)* that are manufactured, imported, sold by Donnelley in California (hereinafter the
23 “Covered Products”); and (b) binders containing lead, including but not limited to, the *Tops*
24 *Notebooks & Binders 8 Piece Set, #527220 (#0 83086 03275 2)* that are manufactured, imported,
25 sold or distributed for sale by Donnelley in California (hereinafter the “Additional Products”).

26 **1.6. Notice of Violation**

27 On or about March 8, 2012, Brimer served Donnelley and certain requisite public
28 enforcement agencies with a “60-Day Notice of Violation” (“Notice”), a document that informed

1 the recipients of Brimer’s allegation that Donnelley was in violation of Proposition 65 for failing
2 to warn its customers and consumers in California that the Covered Products expose users to
3 DEHP.

4 **1.7. Complaint**

5 On June 28, 2012, Brimer filed the instant action against Donnelley (“Complaint”) for the
6 alleged violations of Health & Safety Code § 25249.6 that are the subject of the Notice.

7 **1.8. No Admission**

8 Donnelley denies the material, factual and legal allegations contained in the Notice and
9 Complaint, and it maintains that all of the products that it has sold and distributed in California,
10 including the Covered Products and Additional Products, have been, and are, in compliance with
11 all laws. Nothing in this Consent Judgment shall be construed as an admission of any fact,
12 finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this
13 Consent Judgment constitute or be construed as an admission of any fact, finding, conclusion of
14 law, issue of law, or violation of law. This Section shall not, however, diminish or otherwise
15 affect Donnelley’s obligations, responsibilities, and duties 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 Donnelley as to the allegations in the Complaint, that venue is proper in
19 Alameda County, 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 April 25,
23 2013.

24 **2. INJUNCTIVE RELIEF**

25 **2.1. Reformulation**

26 Commencing on the Effective Date and continuing thereafter, Donnelley shall only
27 import, manufacture, sell or distribute for sale in California “Reformulated Products.” For
28 purposes of this Consent Judgment, Reformulated Products are Covered Products that contain a

1 maximum of 1,000 parts per million (“ppm”) (0.1%) DEHP in any accessible component (i.e.,
2 any component that may be touched or handled during a reasonably foreseeable use) when
3 analyzed pursuant to EPA testing methodologies 3580A and 8270C; and Additional Products that
4 contain a maximum of 100 ppm of lead in any accessible component analyzed pursuant to
5 Environmental Protection Agency testing methodologies 3050B and 6010B, and that yield a
6 result of no more than 1.0 micrograms of lead per sample when any analyzed and tested
7 according to NIOSH 9100 testing methodology. In addition to the testing methodologies
8 authorized under this section a Party may utilize equivalent methodologies employed by federal
9 or state agencies for the purpose of determining lead or DEHP content in a solid substance.

10 **2.2. Market Withdrawal**

11 On or before the Effective Date, Donnelley shall cease shipping the Covered Products and
12 Additional Products to stores and/or customers in California, and Donnelley shall withdraw the
13 Covered Products from the market in California, and, at a minimum, send instructions to any of
14 its stores and/or customers that offer the Covered Products for sale in California to cease offering
15 such Covered Products for sale and to either return all Covered Products to Donnelley for
16 destruction, or to directly destroy the Covered Products. Any destruction of the Covered Products
17 shall be in compliance with all applicable laws. Donnelley represents that it has, prior to the
18 Effective Date, sent instructions to all of its customers to recall or destroy the Covered Products,
19 and that it has produced documentation to Brimer confirming such action. If there is a dispute
20 over the corrective action, the Parties shall meet and confer before seeking any remedy in court.
21 In addition, Donnelley represents that that in late 2011, it ceased shipping the Additional
22 Products and requested that any remaining products in the retail stores be returned to Donnelly.

23 **2.3. Products in the Stream of Commerce**

24 The obligations of Section 2.1 do not apply to any of Donnelley’s Covered Products and
25 Additional Products that have been manufactured, distributed, shipped, sold, or that are otherwise
26 in the stream of commerce prior to the Effective Date.

27 **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(B)**

28 In settlement of all the claims referred to in this Consent Judgment, Donnelley shall pay a

1 total of \$15,000 in civil penalties in accordance with this Section. Each penalty payment will be
2 allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75%
3 of the funds remitted to the California Office of Environmental Health Hazard Assessment
4 (“OEHHA”) and the remaining 25% of the penalty remitted to Brimer, as follows:

5 **3.1. Initial Civil Penalty**

6 Donnelley shall pay an initial civil penalty in the amount of \$5,000 on or before the
7 Effective Date. Donnelley shall issue two separate checks to: (a) “Office of Environmental
8 Health Hazard Assessment” in the amount of \$3,750; and (b) “The Chanler Group in Trust for
9 Russell Brimer” in the amount of \$1,250. All penalty payments shall be delivered to the
10 addresses listed in Section 3.3 below.

11 **3.2. Final Civil Penalty**

12 Donnelley shall pay a final civil penalty of \$10,000 on or before August 1, 2013. The final
13 civil penalty shall be waived in its entirety, however, if, no later than July 15, 2013, an officer of
14 Donnelley provides Brimer with written certification that, as of the date of such certification and
15 continuing into the future, Donnelley has met the reformulation standard specified in Section 2.1
16 above or withdrawn the products pursuant to Section 2.2 above. Any Covered Products and
17 Additional Products manufactured, imported, distributed, sold and/or offered for sale in
18 California by Donnelley in the future shall be Reformulated Products as defined by Section 2.1.
19 The certification in lieu of a final civil penalty payment provided by this Section is a material
20 term, and time is of the essence. Unless waived, Donnelley shall issue two separate checks for its
21 final civil penalty payments to: (a) “Office of Environmental Health Hazard Assessment” in the
22 amount of \$7,500; and (b) “The Chanler Group in Trust for Russell Brimer” in the amount of
23 \$2,500.

24 **3.3. Payment Procedures**

25 **3.3.1. Issuance of Payments**

26 Payments shall be delivered as follows:

- 27 (a) All payments owed to Brimer, pursuant to Sections 3.1 through 3.2,
28 shall be delivered to the following payment address:

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

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

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

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

3.3.2. Issuance of 1099 Forms

After each penalty payment, Donnelley shall issue separate 1099 forms for each payment to Brimer, whose address and tax identification number shall be furnished upon request after this Consent Judgment has been fully executed by the Parties, and OEHHA at the addresses listed in Section 3.3.1 above.

4. REIMBURSEMENT OF FEES AND COSTS

The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. Donnelley then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties then attempted to (but did not) reach an accord on the compensation due to Brimer and his counsel under the private attorney general doctrine codified at Code of Civil Procedure § 1021.5 for all work performed through the Effective Date of this Consent Judgment and reasonably to be performed in connection with the terms set forth in this Consent Judgment after the Effective Date. The Parties do agree, however, that Brimer and his

1 counsel are entitled to their reasonable attorneys' fees and costs under the prerequisites set forth
2 by CCP § 1021.5 including their time incurred in this alternative dispute resolution process.

3 In an effort to save resources, the Parties have agreed to have the outstanding fee and cost
4 issue adjudicated by mediation. If the mediation is unsuccessful, the Parties have further agreed
5 to convey the necessary authority to the neutral conducting the mediation to determine a sum that
6 it deems to be the reasonable attorneys' fees and costs recoverable by plaintiff. Brimer and
7 Donnelley agree that if the mediator is required to make a determination of Brimer's reasonable
8 fees and costs, that determination shall be final and binding upon the Parties. Donnelley agrees to
9 pay the fees and costs of the mediation.

10 The mediation shall take place through AAA or JAMS in San Francisco, California on or
11 before May 15, 2013, with payment to occur within 10 days of the date the mediator awards
12 attorney's fees and costs or the date that the Parties negotiate a fixed sum under the mediation,
13 whichever is sooner. The payment shall be made payable to The Chanler Group at the address in
14 Section 3.3.1(a) of this Consent Judgment.

15 **5. CLAIMS COVERED AND RELEASED**

16 **5.1. Brimer's Public Release of Proposition 65 Claims**

17 Brimer, acting on his own behalf and in the public interest, releases Donnelley from all
18 claims for violations of Proposition 65 up through the Effective Date based on exposures to
19 DEHP from the Covered Products, as set forth in the Notice. Compliance with the terms of this
20 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP
21 from the Covered Products sold by Donnelley before the Effective Date, as set forth in the Notice.

22 This Consent Judgment is a full, final, and binding resolution between Brimer and
23 Donnelley and Donelley's parents, shareholders, divisions, subdivisions, subsidiaries, partners,
24 sister companies and their successors and assigns and all to whom they directly distribute or sell
25 Covered Products including, but not limited to, distributors, wholesalers, customers, retailers,
26 franchisees, cooperative members, and licensees ("Releasees"), of any violation of Proposition 65
27 that have been or could have been asserted in the public interest against Releasees, regarding the
28 failure to warn about exposure to DEHP from the Covered Products manufactured, distributed, or

1 sold by Donnelley prior to the Effective Date, as set forth in the Notice. The parties further
2 understand and agree that the foregoing releases shall not extend upstream to any entities that
3 manufactured the Covered Products for Donnelley (except for Products manufactured by
4 Donnelley, if any) or any component parts thereof, or to any distributors or suppliers who sold the
5 Covered Products or any component parts thereof to Donnelley.

6 **5.2. Brimer's Individual Release of Claims**

7 Brimer, in his individual capacity only and *not* in his representative capacity, also
8 provides a release to Donnelley and the Releasees which shall be effective as a full and final
9 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
10 attorneys' fees, damages, losses, claims, liabilities and demands of Brimer of any nature,
11 character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or
12 actual exposures to DEHP in the Covered Products and/or for alleged or actual exposures to lead
13 in the Additional Products imported, manufactured, sold or distributed for sale by Donnelley
14 before the Effective Date.

15 **5.3. Donnelley's Release of Brimer**

16 Donnelley and all other Releasees hereby waive any and all claims against Brimer and his
17 attorneys and other representatives, for any and all actions taken or statements made (or those that
18 could have been taken or made) by Brimer and his attorneys and other representatives, whether in
19 the course of investigating claims, otherwise seeking to enforce Proposition 65 against Donnelley
20 in this matter, or with respect to the Covered Products or Additional Products.

21 **6. COURT APPROVAL**

22 This Consent Judgment is not effective until it is approved and entered by the Court and
23 shall be null and void if, for any reason, it is not approved and entered by the Court within one
24 year after it has been fully executed by all Parties, in which event any monies paid by Defendants
25 to either Brimer or OEHHA pursuant to Section 3 and/or Section 4 above shall be refunded by
26 Brimer within thirty (30) days after receiving written notice from Donnelley that the one-year
27 period has expired. Brimer will seek reimbursement from OEHHA in such an event.
28

1 **7. SEVERABILITY**

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

5 **8. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the state of
7 California and apply within the state of California. In the event that Proposition 65 is repealed,
8 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Covered
9 Products or Additional Products, then Donnelley may provide written notice to Brimer of any
10 asserted change in the law, and shall have no further obligations pursuant to this Consent
11 Judgment with respect to, and to the extent that, the Covered Products or Additional Products are
12 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Donnelley from any
13 obligation to comply with any pertinent state or federal toxics control laws.

14 **9. NOTICES**

15 Unless specified herein, all correspondence and notices required by this Consent
16 Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or
17 certified mail, return receipt requested; or (iii) a recognized overnight courier to the following
18 addresses:

19 For Donnelley:

20 John Dames
21 191 North Wacker Drive
22 Suite 3700
Chicago, IL 60606

23 For Brimer:

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

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

1 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

5 **11. POST EXECUTION ACTIVITIES**

6 Brimer agrees to comply with the reporting form requirements referenced in Health &
7 Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety
8 Code § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
9 furtherance of obtaining such approval, Brimer shall prepare and file a Motion for Approval of
10 this Consent Judgment (“Motion”) within fourteen (14) days of the Effective Date and Donnelly
11 shall support approval of such Motion.

12 **12. MODIFICATION**

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

16 **13. AUTHORIZATION**

17 The undersigned are authorized to execute this Consent Judgment and have read,
18 understood, and agree to all of the terms and conditions contained herein.

19
20 **AGREED TO:**

AGREED TO:

21
22 Date: March 28, 2013

Date: _____

23
24 By:  _____

By: _____

RUSSELL BRIMER

MARY BETH TIGHE
Vice President and Associate General Counsel
R. R. DONNELLEY & SONS COMPANY

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18 understood, and agree to all of the terms and conditions contained herein.

19
20 **AGREED TO:**

AGREED TO:

21
22 Date: _____

Date: 4/25/13

23
24 By: _____
RUSSELL BRIMER

MATTHEW ROBERTS
(Print)
[Signature]
For R. R. DONNELLEY & SONS COMPANY