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10 RUSSELL BRIMER

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

14 RUSSELL BRIMER,

15 Plaintiff,

16 v.

17 LEAP YEAR PUBLISHING, LLC; *et al.*,

18 Defendants.

Case No. RG12640475

[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 (“Brimer”),
4 and defendant, Leap Year Publishing, LLC (“Leap Year”), with Brimer and Leap Year individually
5 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 exposures to
8 toxic chemicals and to improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 Leap Year 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 and
13 Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that Leap Year sold planners/calendars with vinyl covers containing di(2-
16 ethylhexyl)phthalate (“DEHP”) without first providing the clear and reasonable warning required by
17 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 covered by this Consent Judgment, are planners/calendars with covers
21 containing DEHP, including, but not limited to, the “*Avalon 2012 Weekly/Monthly Planner*” (UPC
22 No. 7 88958 71052 2) (collectively “Products”).

23 **1.6 Notice of Violation**

24 On or about March 08, 2012, Brimer served Leap Year and certain requisite public
25 enforcement agencies with a “60-Day Notice of Violation” (“Notice”), alleging that Leap Year was in
26 violation of Proposition 65 for failing to warn its customers and consumers in California that the
27 Products expose users to DEHP. To the best of the Parties’ knowledge no public enforcer has
28 commenced and is diligently prosecuting the violations alleged in the Notice.

1 **1.7 Complaint**

2 On July 24, 2012, Brimer filed the instant action against Leap Year (“Complaint”) for the
3 alleged violations of Health and Safety Code section 25249.6 that are the subject of the Notice.

4 **1.8 No Admission**

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

13 **1.9 Consent to Jurisdiction**

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

18 **1.10 Effective Date**

19 For purposes of this Consent Judgment, the term “Effective Date” shall mean January 15,
20 2013.

21 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS**

22 Commencing on the Effective Date, and continuing thereafter, Leap Year shall only purchase
23 for sale or distribute for sale in California, “Reformulated Products.” For purposes of this Consent
24 Judgment, Reformulated Products are Products that contain a maximum concentration of 1,000 parts
25 per million DEHP by weight in each accessible component (i.e., any portion or part of a Product that
26 can be touched or handled during a reasonably foreseeable use) when analyzed pursuant to U.S.
27 Environmental Protection Agency testing methodologies 3580A and 8270C, or equivalent
28

1 methodologies utilized by federal or state agencies for the purpose of determining DEHP content in a
2 solid substance.

3 **3. MONETARY PAYMENTS**

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

5 Except as provided in section 3.1.2, Leap Year shall pay \$10,000 in civil penalties. Each
6 penalty payments shall be allocated according to Health & Safety Code section 25249.12 (c)(1) and
7 (d), with seventy-five percent (75%) of the penalty amount earmarked for the California Office of
8 Environmental Health Hazard Assessment (“OEHHA”) and the remaining twenty-five (25%) of the
9 penalty amount earmarked for Brimer.

10 **3.1.1 Initial Civil Penalty**

11 No later than January 20, 2013, Leap Year shall pay an initial civil penalty of \$3,500.
12 The penalty payments shall be allocated according to Health & Safety Code section 25249.12 (c)(1)
13 and (d), with seventy-five percent (75%) of the penalty amount earmarked for the California Office
14 of Environmental Health Hazard Assessment (“OEHHA”) and the remaining twenty-five (25%) of
15 the penalty amount earmarked for Brimer.

16 **3.1.2 Final Civil Penalty; Waiver on Certification**

17 On October 15, 2013, Leap Year shall pay a final civil penalty of \$6,500. The final
18 civil penalty, however, shall be waived in its entirety, however, if, no later than October 1, 2013, an
19 officer of Leap Year certifies to Brimer’s counsel in writing that, as of such date, one-hundred
20 percent of the Products purchased for sale or distributed for sale in California are Reformulated
21 Products as defined by section 2, and that Leap Year will continue to only offer Reformulated
22 Products in California in the future.

23 **3.3 Reimbursement of Brimer’s 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 the issue
26 to be resolved after the material terms of the agreement had been settled. Shortly after all other
27 settlement terms had been finalized, Leap Year expressed a desire to resolve the issue. The Parties
28 then attempted to (and did) reach an accord on the compensation due Brimer and his counsel under

1 general contract principles and the private attorney general doctrine codified at California Code of
2 Civil Procedure section 1021.5 for all work performed in this matter exclusive of fees and costs that
3 may be incurred on appeal, if any. Under these legal principles, Leap Year shall pay \$26,000 for
4 fees and costs incurred investigating, litigating, and enforcing this matter, including the fees and
5 costs incurred (and yet to be incurred) drafting, negotiating, and obtaining the Court's approval of
6 this Consent Judgment in the public interest.

7 **3.4 Payment Procedures**

8 **3.4.1 Payments Held in Trust**

9 All payments made under this Consent Judgment shall be held in trust until the Court
10 approves the settlement. The Parties acknowledge that Brimer's counsel gave Leap Year the option
11 of depositing the funds into its attorney's trust account, but that Leap Year elected to have The
12 Chanler Group hold the settlement funds in trust until such time as the hearing of the motion for
13 judicial approval.

14 **3.4.2 Payment Schedule**

15 All payments made under this consent judgment shall be delivered to the address
16 provided in section 3.4.4 according to the following schedule:

- 17 (a) On or before January 20, 2013, Leap Year shall deliver two checks made
18 payable as follows:
- 19 (i) to "The Chanler Group in Trust for OEHHA" in the amount of \$2,625;
 - 20 and
 - 21 (ii) to "The Chanler Group in Trust for Russell Brimer" in the amount of
22 \$825.
- 23 (b) On or before February 20, 2013, Leap Year shall deliver a single check made
24 payable to "The Chanler Group in Trust" for \$8,750;
- 25 (c) On or before March 20, 2013, Leap Year shall deliver a single check made
26 payable to "The Chanler Group in Trust" for \$8,750; and
- 27 (d) On or before April 20, 2013, Leap Year shall deliver a single check made
28 payable to "The Chanler Group in Trust" for \$8,500.

1 **3.4.3 Issuance of 1099 Forms**

2 After the Consent Judgment has been approved, Leap Year shall issue a separate
3 1099 form to each of the following individuals and entities:

4 (a) “Office of Environmental Health Hazard Assessment”, P.O. Box 4010,
5 Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid;

6 (b) “Russell Brimer”, whose address and tax identification number shall be
7 furnished upon request after this Consent Judgment has been fully executed by the
8 Parties for civil penalties paid; and

9 (c) “The Chanler Group” (EIN: 94-3171522) for fees and costs reimbursed
10 pursuant to section 3.3.

11 Unless waived, Leap Year shall also provide Brimer’s counsel two additional 1099 forms for final
12 civil penalty payments made to OEHHA and Brimer.

13 **3.4.4 Payment Address**

14 All payments and tax forms required by this Consent Judgment shall be delivered to
15 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

21 **4. CLAIMS COVERED AND RELEASED**

22 Brimer acting on his own behalf and in the public interest releases Leap Year and Leap
23 Year’ parents, subsidiaries, affiliated entities under common ownership, directors, officers,
24 employees, attorneys, and each entity to whom Leap Year directly or indirectly distributes or sells
25 the Products, including, but not limited, to its downstream distributors, wholesalers, customers
26 (including, without limitation, Walgreen Co.), retailers, franchisees, cooperative members, and
27 licensees (“Releasees”) from all claims for violations of Proposition 65 up through the Effective
28 Date based on exposures to DEHP from the Products as set forth in the Notice. Compliance with
the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to

1 exposures to DEHP from the Products as set forth in the Notice.

2 **4.2 Brimer’s Individual Release of Claims**

3 Brimer, in his individual capacity only and *not* in his representative capacity, on his own
4 behalf and on behalf of his past and current agents, representatives, attorneys, successors, and/or
5 assignees provides a release to Leap Year and Releasees which shall be effective as a full and final
6 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
7 attorneys’ fees, damages, losses, claims, liabilities and demands of Brimer of any nature, character or
8 kind, whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or
9 actual exposures to DEHP in the Products manufactured, distributed or sold by Leap Year.

10 **4.3 Leap Year’s Release of Brimer**

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

17 **5. COURT APPROVAL**

18 This Consent Judgment is not effective until it is approved and entered by the Court and shall
19 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
20 has been fully executed by all Parties.

21 **6. SEVERABILITY**

22 If, subsequent to the Court’s approval of this Consent Judgment, any provision of this
23 Consent Judgment is held by a court to be unenforceable, the validity of the remaining provisions
24 shall not be adversely affected.

25 **7. GOVERNING LAW**

26 The terms of this Consent Judgment shall be governed by the laws of the state of California
27 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
28 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Leap Year

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

5 **8. NOTICES**

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

9 For Leap Year:

10 Enno Tjalsma, President
11 Leap Year Publishing, LLC
12 21 High Street, Suite 201
North Andover, MA 01845

13 For Brimer:

14 The Chanler Group
15 Attn: Proposition 65 Coordinator
16 2560 Ninth Street
Parker Plaza, Suite 214
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, when
22 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 Health
25 & Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to California
26 Health and Safety Code section 25249.7(f)(4), a noticed motion is required to obtain judicial approval
27 of the settlement. In furtherance of obtaining such approval, Brimer and Leap Year and their
28 respective counsel agree to mutually employ their best efforts to support the entry of this agreement

1 as a Consent Judgment and to obtain judicial approval of the same in a timely manner. For purposes
2 of this Section, "best efforts" shall include, at a minimum, cooperating on the drafting and filing of
3 the moving papers, and supporting the motion for judicial approval.

4 **11. MODIFICATION**

5 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
6 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
7 application of any Party and the 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, understood,
10 and agree to all of the terms and conditions contained herein.

11
12 **AGREED TO:**

AGREED TO:

13
14 Date: 12-21-12

Date: _____

15
16 By: 
RUSSELL BRIMER

By: _____
Enno Tjalsma, President
LEAP YEAR PUBLISHING, LLC

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2 of this Section, "best efforts" shall include, at a minimum, cooperating on the drafting and filing of
3 the moving papers, and supporting the motion for judicial approval.

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6 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
7 application of any Party and the 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, understood,
10 and agree to all of the terms and conditions contained herein.

11
12 **AGREED TO:**

13
14 Date: _____

15
16 By: _____
RUSSELL BRIMER

17 **AGREED TO:**

18 Date: 1/4/13 _____

19 By: _____
Enno Tjalsma, President
LEAP YEAR PUBLISHING, LLC

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