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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA
11 UNLIMITED CIVIL JURISDICTION
12
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14 RUSSELL BRIMER,

15 Plaintiff,

16 v.

17 CYGNETT USA INC.; *et al.*,

18 Defendants.

Case No. RG12647755

[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, Cygnett USA Inc., including all of its affiliate or related entities (collectively
5 “Cygnett”), with Brimer and Cygnett each individually referred to as a “Party” and collectively as the
6 “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

12 Cygnett is a corporate person “in the course of doing business” for purposes of The Safe
13 Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.*
14 (“Proposition 65”).

15 **1.4 General Allegations**

16 Brimer alleges that Cygnett manufactured, distributed, and/or sold laptop and tablet computer
17 cases in the state of California with vinyl/PVC components containing lead and di(2-
18 ethylhexyl)phthalate (“DEHP”) without first providing the clear and reasonable warning required by
19 Proposition 65. Lead and DEHP are each listed pursuant to Proposition 65 as a chemical known to
20 the state of California to cause birth defects or other reproductive harm.

21 **1.5 Product Description**

22 The products that are covered by this Consent Judgment are laptop and tablet computer cases
23 with vinyl/PVC components containing lead and/or DEHP that are sold or distributed for sale in
24 California by Cygnett, including, but not limited to, the following:

- 25 (a) Orange 10” Laptop Sleeve / Bubble CY-B-B10O;
26 (b) Grey 10” Laptop Sleeve / Bubble CY-B-B10G;
27 (c) Black 10” Laptop Sleeve / Bubble CY-B-B10B;
28 (d) Black 13” Laptop Sleeve / Bubble CY-B-B13B;

- 1 (e) Grey 13” Laptop Sleeve / Bubble CY-B-B13G;
- 2 (f) Orange 13” Laptop Sleeve / Bubble CY-B-B13O;
- 3 (g) Black 15” Laptop Sleeve / Bubble CY-B-B15B;
- 4 (h) Grey 15” Laptop Sleeve / Bubble CY-B-B15G;
- 5 (i) Aerosphere Black laptop sleeve with bubble texture for iPad CY0150LSAER;
- 6 (j) Aerosphere Grey laptop sleeve with bubble texture for iPad CY0151LSAER;
- 7 (k) Aerosphere Brown laptop sleeve with bubble texture for iPad CY0152LSAER;
- 8 (l) Aerosphere 13 inch Black CY-B-A13B;
- 9 (m) Aerosphere 15 inch Grey CY-B-A15G; and
- 10 (n) Windsor Brown Leather folio stand case for iPad 2 CY0300CIWIN.

11 All such laptop and tablet computer cases are collectively referred to herein as the “Products.”

12 **1.6 Notice of Violation**

13 On April 5, 2012, Brimer served Cygnett, Cygnett’s distributor, Swann Communications
14 USA Inc. (“Swann”), Cygnett’s retail customer, Fry’s Electronics, Inc. ("Fry's") (Swann, Fry’s, and
15 Radio Shack Corporation (“Radio Shack”) are referred to collectively as “those in the chain of
16 distribution”), and certain requisite public enforcement agencies with a “60-Day Notice of Violation”
17 (“Notice”). The Notice alleged that Cygnett, and those in the chain of distribution, were in violation
18 of Proposition 65 for failing to warn their customers and consumers in California that the Products
19 exposed users to lead and DEHP. To the best of Brimer’s and Cygnett’s knowledge, no public
20 enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice

21 **1.7 Complaint**

22 **1.7.1 Initial Pleading**

23 On September 13, 2012, Brimer filed the instant action against Cygnett (“Complaint”) for the
24 alleged violations of Health and Safety Code section 25249.6 that are the subject of the Notice.

25 **1.7.2 Amendment to Complaint**

26 As of the date of the Court’s approval of this Consent Judgment, the Complaint shall
27 be deemed amended *nunc pro tunc* to include within the definition of “PRODUCTS” provided on
28

1 page 2, paragraph 8 of the Complaint, all of the Products set forth in Section 1.5 of this Consent
2 Judgment.

3 **1.8 No Admission**

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

12 **1.9 Consent to Jurisdiction**

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

17 **1.10 Effective Date**

18 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date this
19 Consent Judgment is fully executed by the Parties.

20 **2. INJUNCTIVE RELIEF**

21 **2.1 Reformulated Products and Warnings**

22 Commencing on the Effective Date and continuing thereafter, Cygnett agrees that the
23 Products it manufactures, distributes, ships, sells or offers to ship for sale in California, will either be
24 "Reformulated Products" as defined by Section 2.2.1, or include a clear and reasonable Proposition
25 65 warning in accordance with Section 2.2.2.

26 **2.2.1 Reformulated Products**

27 For purposes of this Consent Judgment, Reformulated Products comply with the
28 following content limits: (1) a maximum of 1,000 parts per million ("ppm") DEHP by weight in any

1 Accessible Component (i.e. any component that may be touched or handled during a reasonably
2 foreseeable use) when analyzed pursuant to EPA testing methodologies 3580A and 8270C, or
3 equivalent methodologies utilized by state or federal agencies for the purpose of determining DEHP
4 content in a solid substance; and (2) a maximum of 100 ppm lead by weight in any Accessible
5 Component analyzed pursuant to Environmental Protection Agency testing methodologies 3050B
6 and/or 6010B; and (3) a maximum of 1.0 microgram of lead when analyzed pursuant to the NIOSH
7 9100 testing protocol.

8 **2.2.2 Product Warnings**

9 Commencing on the Effective Date and continuing thereafter, for all Products sold in
10 California that are not Reformulated Products, Cygnett shall provide a clear and reasonable warning
11 in accordance with this Section. Each warning shall be prominently placed with such
12 conspicuousness as compared with other words, statements, designs, or devices as to render it likely
13 to be read and understood by an ordinary individual under customary conditions before purchase or
14 use. Each warning shall also be provided in a manner such that the consumer or user understands to
15 which *specific* Product the warning applies, so as to minimize the risk of consumer confusion.

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

18 **2.2.3 Future Enforcement**

19 Provided that Cygnett has complied with the reformulation standards set forth in
20 2.2.1, and the warning obligation established by Section 2.2.2, sales of Products that were purchased,
21 imported, manufactured, or supplied to unaffiliated third parties or those in the chain of distribution
22 prior to the Effective Date shall not be separately actionable under Section 25249.7(d) of the Health
23 and Safety Code in an action for alleged unwarned exposures to lead and/or DEHP from the
24 Products.

25 **3. MONETARY PAYMENTS**

26 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

27 Pursuant to Health and Safety Code section 25249.7(b), Cygnett shall pay civil penalties as
28 set forth in this Section. Each penalty payment will be allocated according to Health and Safety Code

1 section 25249.12 (c)(1) and (d), with seventy-five percent (75%) of the penalty payment earmarked
2 for the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the
3 remaining twenty-five (25%) of the penalty payment earmarked for Brimer.

4 Within five days of the Effective Date, Cygnett shall pay an initial civil penalty of \$8,000.
5 Thereafter, on April 15, 2013, Cygnett shall make a final civil penalty payment of \$24,000. The final
6 civil penalty payment, however, shall be waived in its entirety if, no later than April 1, 2013, an
7 officer of Cygnett certifies to Brimer’s counsel in writing that, as of April 1, 2013, all of the Products
8 Cygnett manufactures for sale in California, purchases for sale in California, or distributes for sale in
9 California are reformulated Products as defined in Section 2.2.1. This certification does not apply to
10 products that are manufactured or are otherwise in existence before April 1, 2013 (i.e., products that
11 were manufactured prior to April 1, 2013, that remain in inventory with Cygnett or those in the chain
12 of distribution, and have yet to be distributed or sold).

13 **3.2 Reimbursement of Brimer’s Fees and Costs**

14 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
15 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
16 to be resolved after the material terms of the agreement had been settled. Shortly after all other
17 settlement terms had been finalized, Cygnett expressed a desire to resolve the fees and costs. The
18 Parties then attempted to (and did) reach an accord on the compensation due Brimer and his counsel
19 under general contract principles and the private attorney general doctrine codified at Code of Civil
20 Procedure section 1021.5 for all work performed in this matter exclusive of fees and costs incurred
21 on appeal, if any. Under these legal principles, within five days of the Effective Date, Cygnett shall
22 pay \$29,500 for the fees and costs incurred investigating, litigating, and enforcing this matter,
23 including the fees and costs incurred (and to be incurred) drafting, negotiating, and obtaining the
24 Court’s approval of this Consent Judgment in the public interest.

25 **3.3 Payment Procedures**

26 **3.3.1 Payments Held in Trust**

27 All payments made under this Consent Judgment shall be held in trust until the Court
28 approves the settlement. The Parties acknowledge that Brimer’s counsel gave Cygnett the option of

1 depositing the funds into its attorney's trust account, but that Cygnett elected to have The Chanler
2 Group hold the settlement funds in trust until such time as the hearing of the motion for judicial
3 approval. Settlement funds delivered to The Chanler Group shall be in the form of three checks for
4 the following amounts made payable to:

- 5 (a) "The Chanler Group in Trust for OEHHA" in the amount of \$6,000;
- 6 (b) "The Chanler Group in Trust for Russell Brimer" in the amount of \$2,000;
- 7 and
- 8 (c) "The Chanler Group in Trust" in the amount of \$29,500.

9 Unless waived, the final civil penalty payment shall be delivered on or before April
10 15, 2013, in two checks for the following amounts, made payable to:

- 11 (a) "The Chanler Group in Trust for OEHHA" in the amount of \$18,000; and
- 12 (b) "The Chanler Group in Trust for Russell Brimer" in the amount of \$6,000.

13 **3.3.2 Issuance of 1099 Forms**

14 After the Consent Judgment has been approved, Cygnett shall provide Brimer's
15 counsel with a separate 1099 form for each of its payments to:

- 16 (a) "Office of Environmental Health Hazard Assessment", P.O. Box 4010,
17 Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid in the 2012
18 calendar year;
- 19 (b) "Russell Brimer", whose address and tax identification number shall be
20 furnished upon request after this Consent Judgment has been fully executed by the
21 Parties for the civil penalty payment in the 2012 calendar year; and
- 22 (c) "The Chanler Group" (EIN: 94-3171522) for fees and costs reimbursed
23 pursuant to Section 3.2.

24 Cygnett also agrees to send Brimer's counsel two additional 1099 forms for civil penalty payments
25 made to OEHHA and Brimer in the 2013 calendar year, if any.

26 **3.3.3 Payment Address**

27 All payments and tax forms required by this Section shall be delivered to the
28 following address:

1
2 The Chanler Group
3 Attn: Proposition 65 Controller
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710

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11 **4. CLAIMS COVERED AND RELEASED**

12 **4.1 Brimer's Public Release of Proposition 65 Claims**

13 Brimer, acting on his own behalf and in the public interest, releases Cygnett and those in the
14 chain of distribution as defined above from all claims for violations of Proposition 65 up through
15 the Effective Date based on exposures to lead and/or DEHP from the Products as set forth in the
16 Notice. Compliance with the terms of this Consent Judgment constitutes compliance with
17 Proposition 65 with respect to exposures to lead and/or DEHP from the Products sold by Cygnett.

18 **4.2 Brimer's Individual Release of Claims**

19 Brimer, in his individual capacity only and *not* in his representative capacity, also provides a
20 release herein to Cygnett and those in its chain of distribution which shall be effective as a full and
21 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
22 attorneys' fees, damages, losses, claims, liabilities and demands of Brimer of any nature, character
23 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
24 exposures to lead and/or DEHP in the Products imported, manufactured, sold or distributed for sale
25 by Cygnett before the Effective Date.

26 **4.3 Cygnett's Release of Brimer**

27 Cygnett on behalf of itself and on behalf of its past and current agents, representatives,
28 attorneys, successors, and/or assignees, hereby waives any and all claims against Brimer and his
attorneys and other representatives, for any and all actions taken or statements made by Brimer and
his attorneys and other representatives, whether in the course of investigating claims, otherwise
seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

5. THIRD PARTY BENEFICIARIES

The Parties expressly understand and confirm that those in the chain of distribution, as that
term is defined above, are intended to be and are beneficiaries of the terms and conditions of this

1 Consent Judgment, to include but not be limited to Sections 4.1 and 4.2 even though those in the
2 chain of distribution are not signatory parties hereto.

3 **6. COURT APPROVAL**

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

7 **7. SEVERABILITY**

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

11 **8. GOVERNING LAW**

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

19 **9. NOTICES**

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

23 For Cygnett and those in the chain of distribution:

24 John Douglas, Operations Manager
25 Cygnett USA, Inc.
26 12636 Clark Street
27 Santa Fe Springs, CA 90670

Randy Fry, President
Fry's Electronics, Inc.
600 East Brokaw Road
San Jose, CA 95112

1 Keith Oldridge, CEO
2 Swann Communications USA Inc.
3 12636 Clark Street
4 Santa Fe Springs, CA 90670

5 with a copy to:

6 Keith McCullough Esq.
7 Alvarado Smith, APC
8 1 MacArthur Place, Suite 200
9 Santa Ana, CA 92707

10 For Brimer:

11 Proposition 65 Coordinator
12 The Chanler Group
13 2560 Ninth Street
14 Parker Plaza, Suite 214
15 Berkeley, CA 94710-2565

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

18 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

22 **11. POST EXECUTION ACTIVITIES**

23 Brimer agrees to comply with the reporting form requirements referenced in Health and
24 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
25 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
26 furtherance of obtaining such approval, Brimer and Cygnett agree to mutually employ their best
27 efforts, and that of their counsel, to support the entry of this agreement as a Consent Judgment, and to
28 obtain judicial approval of the settlement in a timely manner. For purposes of this Section, “best
efforts” shall include, at a minimum, cooperating on the drafting and filing of the necessary moving
papers, and supporting the motion for judicial approval.

1 **12. MODIFICATION**

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

5 **13. AUTHORIZATION**

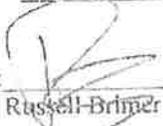
6 The undersigned are authorized to execute this Consent Judgment and have read, understood,
7 and agree to all of the terms and conditions contained herein.

8 **AGREED TO:**

AGREED TO:

9
10 Date: October 12, 2012

Date: October 17, 2012

11 By: 
12 Russell Brimer

By: 
13 Tim Swann, President
14 Cygnett USA Inc.

15 **APPROVED AS TO FORM:**

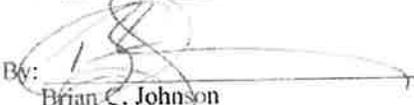
APPROVED AS TO FORM:

16 THE CHANLER GROUP

ALVARADO SMITH APC

17 Date: 10/11/12

Date: 19 October 2012

18 By: 
19 Brian C. Johnson
20 Attorneys for Russell Brimer

By: 
21 Gregory G. Snarr
22 Attorneys for Cygnett USA, Inc.

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