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SUPERIOR COURT OF THE STATE OF CALIFORNIA
SANTA CLARA COUNTY
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,
Plaintiff,
v.
THE WHEAT GROUP, INC.; *et al.*,
Defendants.

Case No. 112CV234450
[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, The Wheat Group, Inc. (“The Wheat Group”), with Brimer and The Wheat Group
5 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 exposures to
8 toxic chemicals and improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 The Wheat Group employs ten or more persons and is a person in the course of doing
12 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
13 Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that The Wheat Group sold backpacks containing lead without first providing
16 the clear and reasonable warning required by Proposition 65. Lead is listed pursuant to Proposition
17 65 as a chemical known to the state of California to cause birth defects or other reproductive harm.

18 **1.5 Product Description**

19 The products covered by this Consent Judgment are the backpacks and bags containing lead
20 that are sold or distributed for sale in California by The Wheat Group, including, but not limited to,
21 the following:

- 22 (a) RBOF110-AST-KIDS REFLECTIVE BACKPACK;
- 23 (b) RBOF111A-AST-BUNGIE BACKPACK;
- 24 (c) RBOF111B-BLK-BUNGIE BACKPACK;
- 25 (d) RBOF112A-AST-2 POCKET BACKPACK;
- 26 (g) RBOF112B-BLK-2 POCKET BACKPACK;
- 27 (h) RBOF113-AST-SLING;
- 28 (i) RBOF114-AST-SMALL DUFFLE;

- 1 (j) RBOF117-AST-PLAID BACKPACK;
- 2 (k) RBOF119BLK-BLK-GYM SACK;
- 3 (l) RBOF119CYA-CYAN-GYM SACK;
- 4 (m) RBOF119GRN-GRN-GYM SACK;
- 5 (n) RBOF119GRY-GRY-GYM SACK; and
- 6 (o) RBOF119MAG-MAG-GYM SACK.

7 All such backpacks and bags containing lead are referred to collectively hereinafter as the “Products.”

8 **1.6 Notice of Violation**

9 On or about May 24, 2012, Brimer served The Wheat Group and certain requisite public
10 enforcement agencies with a “60-Day Notice of Violation” (“Notice”), a document that informed the
11 recipients of Brimer’s allegation that The Wheat Group was in violation of Proposition 65 for failing
12 to warn its customers and consumers in California that the Products expose users to lead.

13 **1.7 Complaint**

14 On October 17, 2012, Brimer filed the instant action against The Wheat Group (“Complaint”)
15 for the alleged violations of Health and Safety Code section 25249.6 that are the subject of the
16 Notice.

17 **1.8 No Admission**

18 The Wheat Group denies the material, factual and legal allegations contained in the Notice
19 and Complaint, and it maintains that all of the products that it has manufactured, imported, sold or
20 distributed in California, including the Products, have been, and are, in compliance with all laws.
21 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion
22 of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute
23 or be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of
24 law. This Section shall not, however, diminish or otherwise affect The Wheat Group obligations,
25 responsibilities, and duties under this Consent Judgment.

26 **1.9 Consent to Jurisdiction**

27 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
28 jurisdiction over The Wheat Group as to the allegations in the Complaint, that venue is proper in

1 Santa Clara County, and that this Court has jurisdiction to enter and enforce the provisions of this
2 Consent Judgment.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term "Effective Date" shall mean December 1,
5 2012.

6 **2. INJUNCTIVE RELIEF: REFORMULATION**

7 Commencing on January 1, 2013, and continuing thereafter, The Wheat Group shall only
8 import, manufacture, sell, or distribute for sale in California, "Reformulated Products." For purposes
9 of this Consent Judgment, Reformulated Products contain a maximum of 100 parts per million of
10 lead when analyzed pursuant to Environmental Protection Agency testing methodologies 3050B and
11 6010B, and that yield a result of no more than 1.0 micrograms of lead when analyzed pursuant to the
12 NIOSH 9100 testing protocol. For purposes of determining the lead content of Products or
13 Reformulated Products under this section, equivalent methodologies used by state and federal
14 agencies to determine lead content in a solid substance may also be used.

15 **3. MONETARY PAYMENTS**

16 **3.1 Civil Penalty Payments**

17 The Wheat Group shall pay \$10,000 in civil penalties. On or before the Effective Date, the
18 Wheat Group shall pay an initial civil penalty of \$5,000. The remaining penalty amount of \$5,000
19 will be due on January 1, 2013. The remaining portion of the penalty, however, will be waived in its
20 entirety if, on or before December 15, 2012, an officer of The Wheat Group certifies in writing to
21 Brimer's counsel that, as of December 1, 2012, all of the Products it sells or distributes for sale in
22 California are Reformulated Products as defined by section 2, and that it will continue to only offer
23 Reformulated Products in California.

24 Each penalty payment shall be allocated according to Health and Safety Code section
25 25249.12 (c)(1) and (d), with seventy-five percent (75%) of the penalty amount earmarked for the
26 California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining
27 twenty-five (25%) of the penalty amount earmarked for Brimer.

28

1 **3.2 Reimbursement of Brimer’s Fees and Costs**

2 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
3 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
4 to be resolved after the material terms of the agreement had been settled. Shortly after all other
5 settlement terms had been finalized, The Wheat Group expressed a desire to resolve the fees and
6 costs. The Parties then attempted to (and did) reach an accord on the compensation due Brimer and
7 his counsel under general contract principles and the private attorney general doctrine codified at
8 Code of Civil Procedure section 1021.5 for all work performed in this matter exclusive of fees and
9 costs incurred on appeal, if any. Under these legal principles, on or before the Effective Date, The
10 Wheat Group shall pay \$30,000 for the fees and costs incurred investigating, litigating, and
11 enforcing this matter, including the fees and costs incurred (and to be incurred) drafting, negotiating,
12 and obtaining the court approval of this Consent Judgment in the public interest.

13 **3.3 Payment Procedures**

14 **3.3.1 Payments Held in Trust**

15 All payments made under this Consent Judgment shall be held in trust until the Court
16 approves the settlement. The Parties acknowledge that Brimer’s counsel gave The Wheat Group the
17 option of depositing the funds into its attorney’s trust account, but that The Wheat Group elected to
18 have The Chanler Group hold the settlement funds in trust until such time as the hearing of the
19 motion for judicial approval. Settlement funds delivered to The Chanler Group shall be in the form
20 of three checks for the for the following amounts made payable to:

- 21 (a) “The Chanler Group in Trust for OEHHA” in the amount of \$3,750;
22 (b) “The Chanler Group in Trust for Russell Brimer” in the amount of \$1,250;
23 and
24 (c) “The Chanler Group in Trust” in the amount of \$30,000.

25 **3.3.2 Issuance of 1099 Forms**

26 After the Consent Judgment has been approved, The Wheat Group shall provide
27 Brimer’s counsel with a separate 1099 form for each of its payments to:

- 28 (a) “Office of Environmental Health Hazard Assessment”, P.O. Box 4010,

1 Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid in the 2012
2 calendar year;

3 (b) "Russell Brimer", whose address and tax identification number shall be
4 furnished upon request after this Consent Judgment has been fully executed by the
5 Parties, for the civil penalty payment in the 2012 calendar year; and

6 (c) "The Chanler Group" (EIN: 94-3171522) for fees and costs reimbursed
7 pursuant to section 3.2.

8 The Wheat Group shall also provide Brimer's counsel with two additional 1099 forms for civil
9 penalty payments made in the 2013 calendar year to OEHHA and Brimer, if any.

10 **3.3.3 Payment Address**

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

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

18 **4. CLAIMS COVERED AND RELEASED**

19 **4.1 Brimer's Public Release of Proposition 65 Claims**

20 Brimer, acting on his own behalf and in the public interest, releases The Wheat Group, its
21 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
22 attorneys, and each entity to whom The Wheat Group directly or indirectly distributes or sells the
23 Products, including, but not limited to, its downstream distributors, wholesalers, customers,
24 retailers, franchisees, cooperative members, licensees and The Wheat Group's licensors (Reebok
25 and its affiliated companies for the Products only) (all of the foregoing collectively "Releasees"),
26 from all claims for violations of Proposition 65 up through the Effective Date based on exposures to
27 lead from the Products, as set forth in the Notice. Compliance with the terms of this Consent
28 Judgment constitutes compliance with Proposition 65 with respect to exposures to lead from the
Products sold by The Wheat Group before the Effective Date, as set forth in the Notice.

1 **4.2 Brimer’s Individual Release of Claims**

2 Brimer, in his individual capacity only and *not* in his representative capacity, also provides a
3 release to The Wheat Group and the Releasees herein which shall be effective as a full and final
4 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
5 attorneys’ fees, damages, losses, claims, liabilities and demands of Brimer of any nature, character
6 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
7 exposures to lead in the Products imported, manufactured, sold or distributed for sale by The Wheat
8 Group and Releasees before the Effective Date.

9 **4.3 The Wheat Group’s Release of Brimer**

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

20 **6. SEVERABILITY**

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

24 **7. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the state of California
26 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
27 otherwise rendered inapplicable by reason of law generally, or as to the Products, then The Wheat
28 Group may provide written notice to Brimer of any asserted change in the law, and shall have no

1 further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
2 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve The Wheat
3 Group from any obligation to comply with any pertinent state or federal toxics control laws.

4 **8. NOTICES**

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

8 For The Wheat Group:

9 Kelly Grismer, President
10 The Wheat Group, Inc.
11 17075 Camino San Bernardo
12 San Diego, CA 92127

12 with a copy to:

13 Douglas M. Vickery, Esq.
14 401 W. A St., Suite 1400
15 San Diego, CA 92101

15 For Brimer:

16 The Chanler Group
17 Attn: Proposition 65 Coordinator
18 2560 Ninth Street
19 Parker Plaza, Suite 214
20 Berkeley, CA 94710

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

23 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

27 **10. POST EXECUTION ACTIVITIES**

28 Brimer agrees to comply with the reporting form requirements referenced in Health & Safety
Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety Code
§ 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance

1 of obtaining such approval, Brimer and The Wheat Group agree to mutually employ their best efforts,
2 and that of their counsel, to support the entry of this agreement as a Consent Judgment, and to obtain
3 judicial approval of the settlement in a timely manner. For purposes of this Section, "best efforts"
4 shall include, at a minimum, cooperating on the drafting and filing of the necessary moving papers,
5 and supporting the motion for judicial approval.

6 **12. MODIFICATION**

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

10 **13. AUTHORIZATION**

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

13
14 **AGREED TO:**

AGREED TO:

15
16 Date: November 7, 2012

Date: _____

17
18 By:  _____
19 RUSSELL BRIMER.

By: _____
20 Kelly Grismer, President
21 THE WHEAT GROUP, INC.

1 of obtaining such approval, Brimer and The Wheat Group agree to mutually employ their best efforts,
2 and that of their counsel, to support the entry of this agreement as a Consent Judgment, and to obtain
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12 and agree to all of the terms and conditions contained herein.

13

14 **AGREED TO:**

AGREED TO:

15

16 Date: _____

Date: 11/8/2012

17

18 By: _____

By:  _____

RUSSELL BRIMER.

Kelly Grismer, President
THE WHEAT GROUP, INC.

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