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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SANTA CLARA
11 UNLIMITED CIVIL JURISDICTION
12
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14 RUSSELL BRIMER,
15 Plaintiff,

16 v.

17 SMART INNOVATIONS, INC.; *et al.*,
18 Defendants.
19

Case No. 112CV234452

[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, Smart Innovations Inc. d/b/a/ Smart Planet (“Smart Innovations”), with Brimer and
5 Smart Innovations 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 Smart Innovations 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 Smart Innovations sold, distributed, or otherwise offered for sale, coffee
16 cups with exterior designs containing lead without first providing the clear and reasonable warning
17 required by Proposition 65. Lead is listed pursuant to Proposition 65 as a chemical known to the state
18 of 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 all coffee cups with exterior
21 decorations that contain lead, including, but not limited to, the *SmartPlanet The Eco Coffee Cup, Item*
22 *#EC-7WHDI (#8 31121 00820 6)*, and the *SmartPlanet The Eco Coffee Cup, Item #EC-7RP (#8*
23 *31121 00515 1)*, that are imported, manufactured, sold, or distributed for sale in California by Smart
24 Innovations (collectively “Products”).

25 **1.6 Notices of Violation**

26 On or about May 24, 2012, Brimer served Smart Innovations and certain public enforcement
27 agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Smart Innovations was in
28

1 violation of Proposition 65 for failing to warn its customers and consumers in California that the
2 Products expose users to lead.

3 Thereafter, on September 26, 2012, Brimer issued a “Supplemental 60-Day Notice of
4 Violation” to Smart Innovations’ retail customer, Walgreen Co., alleging that it also violated
5 Proposition 65 when it failed to warn consumers in California the Products expose users to lead. The
6 Notice and Supplemental Notice are referred to collectively as the “Notices.” To the best of the
7 Parties knowledge, no public enforcer has commenced and is diligently prosecuting the allegations
8 set forth in the Notices.

9 **1.7 Complaint**

10 On October 17, 2012, Brimer filed the instant action against Smart Innovations (“Complaint”)
11 for the alleged violations of Health and Safety Code section 25249.6 that are the subject of the
12 Notice.

13 **1.8 No Admission**

14 Smart Innovations denies the material, factual and legal allegations contained in the Notices
15 and Complaint, and it maintains that all of the products that it has sold and distributed in California,
16 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
17 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
18 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
19 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
20 not, however, diminish or otherwise affect Smart Innovations’ obligations, responsibilities, and duties
21 under this Consent Judgment.

22 **1.9 Consent to Jurisdiction**

23 For purposes of this Consent Judgment only, the Parties stipulate that the Court has
24 jurisdiction over Smart Innovations as to the allegations in the Complaint, that venue is proper in
25 Santa Clara County, and that this Court has jurisdiction to enter and enforce the provisions of this
26 Consent Judgment.

1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean March 15, 2013.

3 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS & WARNINGS**

4 **2.1 Reformulated Products**

5 Commencing on the Effective Date, and continuing thereafter, Smart Innovations shall only
6 ship, sell, or offer to ship for sale in California, Reformulated Products or Products that are labeled
7 with a clear and reasonable warning pursuant to Section 2.3. For purposes of this Consent Judgment,
8 “Reformulated Products” are Products that comply with the reformulation standards set forth in
9 Section 2.2 (“Reformulation Standards”).

10 **2.2 Reformulation Standards**

11 Reformulated Products shall meet or exceed the standards outlined in sections 2.2.1 and 2.2.2,
12 except that, if a Product contains exterior decorations in the Lip and Rim Area (as used throughout
13 this Consent Judgment, the Lip and Rim Area shall include the exterior upper 20 millimeters of a
14 Product) it must also satisfy Section 2.2.3 to qualify as a Reformulated Product.

15 **2.2.1 Wipe Test-Based Standard**

16 The Product yields a maximum result of 1.0 micrograms (µg) lead content by weight on any
17 surface, exclusive of the Lip and Rim Area, with Exterior Decorations analyzed according to the
18 NIOSH 9100 testing protocol.

19 **2.2.2 Content-Based Standard**

20 Exterior Decorations, exclusive of the Lip and Rim Area, only utilize materials that
21 contain a maximum of 90 parts per million (“ppm”) lead by weight as measured either before or after
22 the material is fired onto (or otherwise affixed to) the Product, using EPA Test Method 3050B and
23 6010B, or equivalent methodologies used by state or federal agencies for determining lead content in
24 a solid substance.¹ If, however, Brimer subsequently enters into a Consent Judgment relating to lead
25 contained in the exterior decorations of coffee cups, or other ceramic beverage-ware, that provides a
26

27 ¹ If the Exterior Decoration is tested after it is affixed to a Covered Product, the percentage of lead by
28 weight must relate only to the decorating material and must not include any quantity attributable to non-
decorating material (*e.g.*, the ceramicware substrate).

1 lead content limit which is more than 90 ppm, Smart Innovations shall be allowed to utilize such
2 level to comply with the Reformulation Standard for lead content established by this agreement.

3 **2.2.3 Lip and Rim Area Standard**

4 If a Product contains Exterior Decorations in the Lip and Rim Area, it shall only
5 utilize decorating materials that yield a result of no detectable lead, or yield a maximum lead
6 concentration of 0.005 micrograms per milliliter ($\mu\text{g/ml}$) when tested according to ASTM Test
7 Method C927-80 (2009).

8 **2.3 Clear and Reasonable Warnings**

9 Smart Innovations shall provide a clear and reasonable warning for any Product that it ships,
10 sells, or offers to ship or sell for sale in California that is not a Reformulated Product. Smart
11 Innovations shall provide the warning affixed to the packaging or labeling, or directly to a Product,
12 with the following statement:

13 **WARNING:** This product contains lead, a chemical known to
14 the State of California to cause birth defects or
other reproductive harm.

15 The warning shall be prominently placed with such conspicuousness as compared with other words,
16 statements, designs, or devices as to render it likely to be read and understood by an ordinary
17 individual under customary conditions of purchase or use.

18 **3. MONETARY PAYMENTS**

19 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)**

20 Pursuant to Health and Safety Code section 25249.7(b), except as provided herein, Smart
21 Innovations shall pay \$18,000 in civil penalties. On or before the December 31, 2012, Smart
22 Innovations shall pay an initial civil penalty of \$6,000. Thereafter, on September 15, 2013, Smart
23 Innovations shall pay the remaining penalty amount of \$12,000. The remaining portion of the
24 penalty shall be waived in its entirety, however, if, no later than September 1, 2013, an officer of
25 Smart Innovations certifies in writing to Brimer's counsel that all of the Products sold or distributed
26 for sale in California by Smart Innovations as of such date comply with the Reformulation Standards
27 established by section 2.2, and that Smart Innovations is no longer selling or distributing for sale in
28 California, Products labeled with a clear and reasonable warning pursuant to Section 2.3.

1 Alternatively, Smart Innovations may provide Brimer’s counsel with written certification that it has
2 ceased sales of the Products in California and will not offer the Products for sale in California until
3 such time as only Reformulated Products can be made available. If such certification is received by
4 September 1, 2013, the \$12,000 portion of the civil penalty remaining will be waived in its entirety.

5 Each penalty payment shall be allocated according to Health and Safety Code section
6 25249.12 (c)(1) and (d), with seventy-five percent (75%) of the penalty amount earmarked for the
7 California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
8 twenty-five (25%) of the penalty amount earmarked for Brimer.

9 **3.2 Reimbursement of Brimer’s Fees and Costs**

10 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
11 reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the issue to be
12 resolved after the material terms of the agreement had been settled. Shortly after all other settlement
13 terms had been finalized, Smart Innovations expressed a desire to negotiate the reimbursement of
14 Brimer’s fees and costs. The Parties then attempted to (and did) reach an accord on the
15 compensation due Brimer and his counsel under general contract principles and the private attorney
16 general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this
17 matter exclusive of fees and costs incurred on appeal, if any. Under these legal principles, on or
18 before December 31, 2012, Smart Innovations shall pay \$35,000 for the fees and costs incurred
19 investigating, litigating, and enforcing this matter, including the fees and costs incurred (and to be
20 incurred) drafting, negotiating, and obtaining the Court’s approval of this Consent Judgment in the
21 public interest.

22 **3.3 Payment Procedures**

23 **3.3.1 Payments to Brimer in Trust**

24 All payments made under this Consent Judgment shall be held in trust until the Court
25 approves the settlement. The Parties acknowledge that Brimer’s counsel gave Smart Innovations the
26 option of depositing the funds into its attorneys’ trust account, but that Smart Innovations elected to
27 have The Chanler Group hold the settlement funds in trust until such time as the hearing of the
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1 motion for judicial approval. Settlement funds delivered to The Chanler Group shall be in the form
2 of three checks for the following amounts made payable to:

- 3 (a) "The Chanler Group in Trust for OEHHA" in the amount of \$4,500;
- 4 (b) "The Chanler Group in Trust for Russell Brimer" in the amount of \$1,500;
- 5 and
- 6 (c) "The Chanler Group in Trust" in the amount of \$35,000.

7 **3.3.2 Issuance of 1099 Forms**

8 Smart Innovations shall provide Brimer's counsel with a separate 1099 form for each
9 of its payments to:

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

18 Smart Innovations will also provide Brimer's counsel with two additional 1099 forms for civil
19 penalty payments to OEHHA and Brimer made in the 2013 calendar year, if any.

20 **3.3.3 Payment Address**

21 All payments and tax forms required by this Consent Judgment shall be delivered to
22 the following address:

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

28 **4. CLAIMS COVERED AND RELEASED**

4.1 Brimer's Public Release of Proposition 65 Claims

Brimer acting on his own behalf and in the public interest releases Smart Innovations and

1 Smart Innovations’ parents, subsidiaries, affiliated entities under common ownership, directors,
2 officers, employees, attorneys, and each entity to whom Smart Innovations directly or indirectly
3 distributes or sells the Products, including, but not limited, to its downstream distributors,
4 wholesalers, customers (including, without limitation, Walgreen Co.), retailers, franchisees,
5 cooperative members, and licensees (“Releasees”) from all claims for violations of Proposition 65
6 up through the Effective Date based on exposures to lead from the Products as set forth in the
7 Notice. Compliance with the terms of this Consent Judgment constitutes compliance with
8 Proposition 65 with respect to exposures to lead from the Products as set forth in the Notice.

9 **4.2 Brimer’s Individual Release of Claims**

10 Brimer, in his individual capacity only and *not* in his representative capacity, on his own
11 behalf and on behalf of his past and current agents, representatives, attorneys, successors, and/or
12 assignees provides a release to Smart Innovations and Releasees which shall be effective as a full and
13 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
14 attorneys’ fees, damages, losses, claims, liabilities and demands of Brimer of any nature, character or
15 kind, whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or
16 actual exposures to lead in the Products manufactured, distributed or sold by Smart Innovations.

17 **4.3 Smart Innovations’ Release of Brimer**

18 Smart Innovations, on its own behalf, and on behalf of its past and current agents,
19 representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against
20 Brimer and his attorneys and other representatives, for any and all actions taken or statements made
21 (or those that could have been taken or made) by Brimer and his attorneys and other representatives,
22 whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it
23 in this matter, or with respect to the Products.

24 **5. COURT APPROVAL**

25 This Consent Judgment is not effective until it is approved and entered by the Court, and shall
26 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
27 has been fully executed by the Parties.
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1 **6. 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 be
4 adversely affected.

5 **7. GOVERNING LAW**

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

13 **8. NOTICES**

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

17 For Smart Innovations:

18 Mike Katz, President
19 Smart Innovations Inc.
20 9035 Independence
21 Canoga Park, CA 91304

22 And to the attorney for Smart Innovations:

23 Kenneth E. Chyten
24 LAW OFFICE OF KENNETH E. CHYTEN
25 300 East Esplanade Drive, Suite 900
26 Oxnard, CA. 93036

27 For Brimer:

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

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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

7 **10. POST EXECUTION ACTIVITIES**

8 Brimer agrees to comply with the reporting form requirements referenced in Health and
9 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
10 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
11 furtherance of obtaining such approval, Brimer and Smart Innovations agree to mutually employ their
12 best efforts, and that of their counsel, to support the entry of this agreement as a Consent Judgment,
13 and to obtain judicial approval of the settlement in a timely manner. For purposes of this Section,
14 "best efforts" shall include, at a minimum, cooperating on the drafting and filing of the necessary
15 moving papers, and supporting the motion for judicial approval.

16 **12. MODIFICATION**

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

20 **13. AUTHORIZATION**

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

23
24 **AGREED TO:**

25 Date: December 18, 2012

26
27 By: 
28 RUSSELL BRIMER

AGREED TO:

Date: 12.17.12

By: 
Mike Katz, President

SMART INNOVATIONS, INC.