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

15 RUSSELL BRIMER,
16 Plaintiff,
17 v.
18 RASHMAN CORPORATION; and DOES 1-
19 150, inclusive,
20 Defendants.

Case No.: RG 13686058

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

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1. INTRODUCTION

1.1 Russell Brimer and Rashman Corporation

This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer” or “Plaintiff”) and Rashman Corporation (“Rashman” or “Defendant”), with Brimer and Rashman collectively referred to as the “Parties.”

1.2 Russell Brimer

Brimer is an individual residing in the State of California who seeks to promote awareness of exposure to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer and commercial products. Brimer brings this Proposition 65 action acting in the interest of the general public as a private attorney general after service of a 60-Day Notice of Violation ("Notice") had been sent to the Attorney General of the State of California and the District Attorney for Each of the 58 counties in California and the City Attorney for Los Angeles, San Diego, San Jose, San Francisco and Sacramento (hereafter “Governmental Entities”). This Proposition 65 action was brought by Brimer more than 60 days after service of the Notice on the Governmental Entities.

1.3 Rashman Corporation

Brimer alleges that Rashman employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6, *et seq.* (“Proposition 65”).

1.4 General Allegations

Brimer alleges that Rashman has manufactured, imported, distributed and/or sold ballpoint pen grips containing di(2-ethylhexyl)phthalate (“DEHP”) in California without the requisite Proposition 65 health hazard warnings. DEHP is listed pursuant to Proposition 65 as known to the State of California to cause birth defects and other reproductive harm.

1.5 Product Description

The products that are covered by this Consent Judgment are defined as ballpoint pens having grips containing DEHP including, but not limited to, the *Prestige Medical Chart Pen, S400 (#7*

1 86511 56131 4), manufactured, imported, distributed and/or sold by Rashman in California,
2 hereinafter referred to as the “Products.”

3 **1.6 Notice of Violation**

4 On July 11, 2012, Brimer served Rashman and various public enforcement agencies, with a
5 document entitled “60-Day Notice of Violation” (“Notice”) that provided the recipients with notice
6 of alleged violations of California Health & Safety Code § 25249.6 based on Rashman’s alleged
7 failure to warn consumers that the Products exposed users in California to DEHP. To the best of the
8 Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations
9 set forth in the Notice.

10 **1.7 Complaint**

11 On July 1, 2013, Brimer filed a complaint in the Superior Court in and for the County of
12 Alameda against Rashman and Does 1 through 150, *Brimer v. Rashman Corporation, et al.*, Case
13 No. RG13686058 (the “Complaint”), alleging violations of California Health & Safety Code
14 § 25249.6, based on the alleged exposures to DEHP contained in the Products sold by Rashman.

15 **1.8 No Admission**

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

24 **1.9 Consent to Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over Rashman as to the allegations contained in the Complaint, that venue is proper in
27 the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of
28 this Consent Judgment.

1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean December 16,
3 2013.

4 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

5 **2.1 Injunctive Relief**

6 As of the Effective Date, Rashman shall only acquire for distribution to or sale in
7 California, Products that: (1) qualify as Reformulated Products as defined in Section 2.2 below; or
8 (2) include one of the clear and reasonable warnings set forth in Section 2.3 below.

9 **2.2 Reformulation Standards**

10 Reformulated Products are defined as those Products containing DEHP in concentrations
11 less than 0.1 percent (1,000 parts per million) in each Accessible Component when analyzed
12 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any
13 other methodology utilized by federal or state agencies for the purpose of determining the DEHP
14 content in a solid substance. “Accessible Component,” as used in this Consent Judgment, means a
15 component of a Product that can be touched by a person during normal, intended and foreseeable
16 use of the Product.

17 **2.3 Product Warnings**

18 Commencing on the Effective Date, Rashman shall, for all Products, other than
19 Reformulated Products, sold in California, and all Products, other than Reformulated Products,
20 sold to customers located outside of California that have a California warehouse, distribution
21 center, maintain a retail outlet in California or has made internet sales into California on or after
22 January 1, 2013, provide clear and reasonable warnings as set forth in subsections 2.3(a) and (b).
23 Each warning shall be prominently placed with such conspicuousness as compared with other
24 words, statements, designs, or devices as to render it likely to be read and understood by an
25 ordinary individual under customary conditions before purchase or use. Each warning shall be
26 provided in a manner such that the consumer or user understands to which *specific* Product the
27 warning applies, so as to minimize the risk of consumer confusion.

1 **(a) Product Labeling.** Rashman shall affix a warning to the packaging,
2 labeling, or directly on each of the Products, other than Reformulated Products, sold to California
3 residents and to all Products, other than Reformulated Products, sold to customers located outside of
4 California that have a California warehouse, distribution center, maintain a retail outlet in California
5 or has made internet sales into California on or after January 1, 2013, that states:

6 **WARNING:** This product contains DEHP, a chemical known to
7 the State of California to cause birth defects and
8 other reproductive harm.

9 **(b) Internet Website Warning.** If after the Effective Date, Rashman sells the
10 Products, other than Reformulated Products, via the internet, a warning shall be given in
11 conjunction with the sale of the Products on the Rashman website, which warning shall appear
12 either: (a) on the same web page on which a Product is displayed; (b) on the same web page as the
13 order form for a Product; (c) on the same page as the price for any Product; or (d) on one or more
14 web pages displayed to a purchaser during the checkout process. The following warning statement
15 shall be used and shall appear in any of the above instances adjacent to or immediately following
16 the display, description, or price of the Product for which it is given in the same type size or larger
17 than the Product description text:

18 **WARNING:** This product contains DEHP, a chemical known to
19 the State of California to cause birth defects and
20 other reproductive harm.

21 Alternatively, the designated symbol may appear adjacent to or immediately following the
22 display, description, or price of the Product for which a warning is being given, provided that the
23 following warning statement also appears elsewhere on the same web page, as follows:

24 **WARNING:** Products identified on this page with the following
25 symbol ▼ contain DEHP, a chemical known to the
26 State of California to cause birth defects and other
27 reproductive harm.

1 **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

2 In settlement of all the claims referred to in this Consent Judgment, Rashman shall pay a
3 total of \$6,000 in civil penalties in accordance with this Section. Each penalty payment will be
4 allocated in accordance with California Health & Safety Code §§ 25249.12(c)(1) & (d), with 75%
5 of the funds remitted to the California Office of Environmental Health Hazard Assessment
6 (“OEHHA”) and the remaining 25% of the penalty remitted to Brimer as follows:

7 **3.1 Initial Civil Penalty**

8 Rashman shall pay an initial civil penalty in the amount of \$2,000 on or before December 1,
9 2013, Rashman shall issue two separate checks to: (a) “OEHHA” in the amount of \$1,500; and (b)
10 “The Chanler Group in Trust for Russell Brimer” in the amount of \$500. All penalty payments
11 shall be delivered to the addresses listed in Section 3.3 below.

12 **3.2 Final Civil Penalty**

13 Rashman shall pay a final civil penalty of \$4,000 on or before December 31, 2013. The
14 final civil penalty shall be waived in its entirety, however, if an officer of Rashman provides Brimer
15 with written certification that, as of December 16, 2013 and continuing into the future, Rashman has
16 met the reformulation standard specified in Section 2.2 above, such that all Products manufactured,
17 imported, distributed, sold and offered for sale in California by Rashman are Reformulated
18 Products. Brimer must receive any such certification on or before December 30, 2013. The
19 certification in lieu of a final civil penalty payment provided by this Section is a material term, and
20 time is of the essence. Rashman shall issue two separate checks for its final civil penalty payments
21 to: (a) “OEHHA” in the amount of \$3,000; and (b) “The Chanler Group in Trust for Russell
22 Brimer” in the amount of \$1,000.

23 **3.3 Payment Procedures**

24 **3.3.1 Issuance of Payments.** Payments shall be delivered as follows:

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

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

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

9 For United States Postal Service Delivery:

10 Mike Gyurics
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 P.O. Box 4010
14 Sacramento, CA 95812-4010

15 For Non-United States Postal Service Delivery:

16 Mike Gyurics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
19 1001 I Street
20 Sacramento, CA 95814

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

23 **3.3.2 Issuance of 1099 Forms.** After each penalty payment, Rashman shall issue
24 separate 1099 forms for each payment to Brimer, whose address and tax identification number
25 shall be furnished upon request after this Consent Judgment has been fully executed by the Parties,
26 and OEHHA at the addresses listed in Section 3.3.1(b) above.

27 **4. REIMBURSEMENT OF FEES AND COSTS**

28 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. Rashman 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 (and did) reach an accord on the compensation due to
Brimer and his counsel under general contract principles and the private attorney general doctrine

1 codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual
2 execution of this agreement. Rashman shall pay \$26,000 for fees and costs incurred as a result of
3 investigating, bringing this matter to Rashman’s attention, negotiating a settlement in the public
4 interest, and in obtaining the Court's approval of this Consent Judgment in the public interest.
5 Rashman shall issue a separate 1099 for fees and costs (EIN: 94-3171522), shall make the check
6 payable to “The Chanler Group” and shall deliver payment on or before December 1, 2013 to the
7 address listed in Section 3.3.1(a) above.

8 **5. CLAIMS COVERED AND RELEASED**

9 **5.1 Brimer’s Release of Proposition 65 Claims**

10 Brimer acting on his own behalf and in the public interest releases Rashman, its parents,
11 subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys,
12 and each entity to whom Rashman directly or indirectly distributes or sells Products, including, but
13 not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative
14 members, and licensees (“Releasees”), from all claims for violations of Proposition 65 up through
15 the Effective Date based on exposure to DEHP from the Products set forth in the Notice.
16 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
17 with respect to exposures to DEHP from the Products as set forth in the Notice.

18 **5.2 Brimer’s Individual Release of Claims**

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

25 **5.3 Rashman’s Release of Brimer**

26 Rashman on behalf of itself, its past and current agents, representatives, attorneys,
27 successors, and/or assignees, hereby waives any and all claims against Brimer, his attorneys and
28 other representatives, for any and all actions taken or statements made (or those that could have

1 been taken or made) by Brimer and his attorneys and other representatives, whether in the course of
2 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with
3 respect to the Products.

4 **6. COURT APPROVAL**

5 This Consent Judgment is not effective until it is approved and entered by the Court and
6 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
7 after it has been fully executed by all Parties. If the Court does not approve and enter the Consent
8 Judgment within one year of the Effective Date, any monies that have been provided to OEHHA or
9 held in trust for Brimer or his counsel pursuant to Section 3, above, shall be refunded to Rashman
10 within 15 days. Brimer shall file an appropriate motion to approve the Consent Judgment with the
11 Court promptly after Rashman has signed this Consent Judgment.

12 **7. SEVERABILITY**

13 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
14 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
15 remaining shall not be adversely affected.

16 **8. GOVERNING LAW**

17 The terms of this Consent Judgment shall be governed by the laws of the State of California
18 and apply within the State of California. In the event that Proposition 65 is repealed, preempted or
19 is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this
20 Consent Judgment are rendered inapplicable or are no longer required as a result of any such repeal
21 or preemption or rendered inapplicable by reason of law generally as to the Products, then Rashman
22 shall provide written notice to Brimer of any asserted change in the law, and shall have no further
23 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products
24 are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Rashman from any
25 obligation to comply with any pertinent state or federal toxics control law.

26 **9. NOTICES**

27 Unless specified herein, all correspondence and notices required to be provided pursuant to
28 this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,

1 (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the
2 other party at the following addresses:

3 To Rashman:

4 Steven L. Feldman, Esq.
5 Goldfarb, Sturman & Averbach
6 15760 Ventura Blvd.
7 Nineteenth Floor
8 Encino, CA 91436-3012

To Brimer:

Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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

9 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

10 This Consent Judgment may be executed in counterparts and by facsimile or .pdf signature,
11 each of which shall be deemed an original, and all of which, when taken together, shall constitute
12 one and the same document. A facsimile or .pdf signature shall be as valid as the original.

13 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

14 Brimer and his attorneys agree to comply with the reporting form requirements referenced in
15 California Health & Safety Code § 25249.7(f).

16 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

17 Brimer and Rashman agree to mutually employ their best efforts to support the entry of this
18 agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a
19 timely manner. The Parties acknowledge that, pursuant to California Health & Safety Code
20 § 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment, which
21 Brimer shall draft and file, and Rashman shall join. If any third party objection to the noticed
22 motion is filed, Brimer and Rashman shall work together to file a joint reply and appear at any
23 hearing before the Court. This provision is a material component of the Consent Judgment and
24 shall be treated as such in the event of a breach.

25 **13. MODIFICATION**

26 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
27 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
28 of any Party and entry of a modified Consent Judgment by the Court.

1 **14. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties and have read, understood, and agree to all of the terms and conditions of this
4 Consent Judgment.

5
6 AGREED TO:

AGREED TO:

7 Date: October 24, 2013

Date: _____

8
9 By:  _____
10 Plaintiff, RUSSELL BRIMER

By: _____
Defendant, Rashman Corporation
Richard Rashman, its CEO

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14. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.


AGREED TO:

AGREED TO:

Date: _____

Date: Oct 25, 2013

By: _____
Plaintiff, RUSSELL BRIMER

By: 
Defendant, Rashman Corporation
Richard Rashman, its CEO