

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Josh Voorhees, State Bar No. 241436
Troy C. Bailey, State Bar No. 277424
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118

Attorneys for Plaintiff
RUSSELL BRIMER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MARIN
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,
Plaintiff,
v.
PILOT CORPORATION OF AMERICA; and
DOES 1-150, inclusive,
Defendants.

) Case No.: CIV-1300991

) **[PROPOSED] CONSENT JUDGMENT**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. INTRODUCTION

1.1 Russell Brimer and Pilot Corporation of America

This Consent Judgment is entered into by and between Russell Brimer (“Brimer” or “Plaintiff”), and Pilot Corporation of America (“Pilot” or “Defendant”), with Plaintiff and Defendant 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.

1.3 Pilot Corporation of America

Brimer alleges that Pilot 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 Pilot has manufactured, imported, distributed and/or sold vinyl/PVC pen pouches containing di(2-ethylhexyl)phthalate (“DEHP”) without the requisite Proposition 65 warnings. DEHP is listed under Proposition 65 a chemical known to cause birth defects and other reproductive harm.

1.5 Product Description

The products that are covered by this Consent Judgment are defined as follows: vinyl/PVC pen pouches containing DEHP including, but not limited to, *Pilot G2 Retractable Gel Ink Rolling Ball (#0 72838 31128 3)*, manufactured, imported, distributed and/or sold by Pilot in California, hereinafter the “Products.”

1.6 Notice of Violation

On July 11, 2012, Brimer served Pilot and various public enforcement agencies, with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided the recipients with notice of alleged violations of Proposition 65 based on Pilot’s alleged failure to warn consumers

1 that the Products exposed users in California to DEHP. To the best of the Parties' knowledge, no
2 public enforcer has prosecuted the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On March 6, 2013, Brimer filed a complaint in the Superior Court in and for the County of
5 Marin against Pilot and Does 1 through 150, *Brimer v. Pilot Corporation of America, et al.*, Case
6 No. CIV-1300991 ("Complaint" or "Action"), alleging violations of Proposition 65, based on the
7 alleged exposures to DEHP contained in certain vinyl/PVC pen pouches sold by Pilot.

8 **1.8 No Admission**

9 Pilot denies the material, factual and legal allegations contained in Brimer's Notice and
10 Complaint and maintains that all products that it has sold, manufactured, imported and/or
11 distributed in California, including the Products, have been and are in compliance with all laws.
12 Nothing in this Consent Judgment shall be construed as an admission by Pilot of any fact, finding,
13 issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be
14 construed as an admission by Pilot of any fact, finding, conclusion, issue of law, or violation of law.
15 However, this section shall not diminish or otherwise affect Pilot's obligations, responsibilities, and
16 duties under this Consent Judgment.

17 **1.9 Consent to Jurisdiction**

18 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
19 jurisdiction over Pilot as to the allegations contained in the Complaint, that venue is proper in the
20 County of Marin and that this Court has jurisdiction to enter and enforce the provisions of this
21 Consent Judgment.

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
24 this Consent Judgment is entered by the Court, including any tentative rulings not opposed by the
25 Parties.
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. **INJUNCTIVE RELIEF: REFORMULATION**

2.1 **Reformulation Standard**

Reformulated Products are defined as those Products containing DEHP in concentrations less than 0.1 percent (1,000 parts per million) in each accessible component when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, CPSC-WH-C1001-09.3 or any other methodology utilized by federal or state agencies for the purpose of determining the DEHP content in a solid substance.

2.2 **Reformulation Commitment**

As of the Effective Date, Pilot shall not manufacture, import, or distribute the Products for sale in the State of California unless they are Reformulated Products pursuant to Section 2.1 above.

The parties acknowledge and agree that Pilot has already implemented a warning program for all non-Reformulated Products manufactured, distributed, and/or sold by Pilot, that provides as follows:

WARNING: This clear pouch material contains a chemical known to the State of California to cause cancer, and birth defects or other reproductive harm.

Pilot shall continue to use said warnings on all non-Reformulated Products through the Effective Date. As of the Effective Date, all Products, except for Products that contain Pilot's current warning and have already been distributed into the stream of commerce, must qualify as Reformulated Products pursuant to the standards set forth in Section 2.1 above.

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

In settlement of all the claims referred to in this Consent Judgment, Pilot shall pay a total of \$19,000 in civil penalties in accordance with this Section. Each penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Brimer, as follows:

1 **3.1 Initial Civil Penalty**

2 Pilot shall make an initial civil penalty payment of \$3,000 to be apportioned in
3 accordance Section 3 above. Pilot shall issue two separate checks for its initial civil penalty
4 payment to: (a) "OEHHA" in the amount of \$2,250; and (b) "Toledo Don LLP in Trust for Russell
5 Brimer" in the amount of \$750. Such payment shall be made, in the manner detailed in Section 3.4
6 below, on or before January 31, 2014.

7 **3.2 Final Civil Penalty**

8 Pilot shall pay a final civil penalty of \$16,000 on or before June 2, 2014. The final civil
9 penalty shall be waived in its entirety, however, if, no later than May 15, 2014, an officer of Pilot
10 provides Brimer with written certification that, as of the date of such certification and continuing
11 into the future, Pilot has met the reformulation standard specified in Section 2.1 above, such that all
12 Products manufactured, imported, and distributed, in California by Pilot are Reformulated Products
13 and that Pilot will continue to manufacture, import, distribute, sell and offer for sale in California
14 only Reformulated Products. Brimer must receive any such certification on or before May 15,
15 2014. The certification in lieu of a final civil penalty payment provided by this Section is a material
16 term, and time is of the essence. Pilot shall issue two separate checks for its final civil penalty
17 payments to: (a) "OEHHA" in the amount of \$12,000; and (b) "The Chanler Group in Trust for
18 Russell Brimer" in the amount of \$4,000. Unless waived, this payment shall be made in the manner
19 detailed in Section 3.4 below.

20 **3.3 Reimbursement of Plaintiff's Fees and Costs**

21 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
22 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the fee
23 issue to be resolved after the material terms of the agreement had been settled. Pilot then
24 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
25 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to
26 Brimer and his counsel under general contract principles and the private attorney general doctrine
27 codified at California Code of Civil Procedure section 1021.5, for all work performed (and to be
28

1 performed) in this matter, except fees that may be incurred in connection with a third-party,
2 including the Office of the Attorney General, appeal (if any). Under these legal principles, Pilot
3 shall pay the amount of \$22,000 to reimburse Brimer's fees and costs incurred investigating,
4 litigating and enforcing this matter, including the fees and costs incurred (and yet to be incurred)
5 negotiating, drafting, and obtaining the Court's approval of this Consent Judgment in the public
6 interest. This payment shall be made in the manner detailed in Section 3.4 below, on or before
7 January 31, 2014.

8 **3.4 Payment Procedures**

9 **3.4.1. Issuance of Payments.** Payments shall be delivered as follows:

- 10 (a) All payments owed to Brimer pursuant to Sections 3.1 and 3.3, shall be
11 delivered to the attorney of record for Pilot on or before January 31,
12 2014, and shall be held in trust pending the Court's approval of this
13 Consent Judgment, including any tentative rulings not opposed by
14 either of the Parties. Such counsel shall confirm, in writing within 5
15 days of deposit, that the funds have been deposited into the trust
16 account. Within ten days of the date on which the Court approves the
17 Consent Judgment, including any tentative rulings not opposed by the
18 Parties, the payments being held in trust by the attorney of record for
19 Pilot shall be delivered to The Chanler Group in two separate checks
20 payable to: (i) "The Chanler Group in Trust for Russell Brimer" in the
21 amount of \$750; and (ii) "The Chanler Group" in the amount of
22 \$22,000, to the following payment address:

23 The Chanler Group
24 Attn: Proposition 65 Controller
25 2560 Ninth Street
26 Parker Plaza, Suite 214
27 Berkeley, CA 94710
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

With a copy of the checks payable to OEHHA mailed to The Chanler Group at the address set forth above in 3.4.1(a), as proof of payment to OEHHA.

(c) If the penalty payment owed to Brimer as required by Section 3.2 above is not waived, payment shall be delivered directly to The Chanler Group at the following address:

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

3.4.2 Issuance of 1099 Forms. After each penalty payment, Pilot shall issue separate 1099 forms for each payment to Brimer, whose address and tax identification number shall be furnished upon request after this Consent Judgment has been fully executed by the Parties, and OEHHA at the addresses listed in Section 3.4.1 above.

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Brimer’s Release of Proposition 65 Claims**

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

11 **4.2 Brimer’s Individual Release of Claims**

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

18 **4.3 Pilot’s Release of Brimer**

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

25
26
27
28

1 **5. COURT APPROVAL**

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

5 **6. SEVERABILITY**

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

9 **7. GOVERNING LAW**

10 The terms of this Consent Judgment shall be governed by the laws of the State of California
11 and apply within the State of California. In the event that Proposition 65 is repealed, preempted or
12 is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this
13 Consent Judgment are rendered inapplicable by preemption or reason of law generally as to the
14 Products, then Pilot shall have no further obligations pursuant to this Consent Judgment with
15 respect to, and to the extent that, the Products are so affected.

16 **8. NOTICES**

17 Unless specified herein, all correspondence and notices required to be provided pursuant to
18 this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
19 (registered or certified mail) return receipt requested; or (ii) overnight courier on any Party by the
20 other Party at the following addresses:

21 To Pilot:	To Brimer:
22 Peg Carew Toledo, Esq.	Proposition 65 Coordinator
23 TOLEDO DON LLP	The Chanler Group
24 3001 Douglas Blvd., Suite 340	2560 Ninth Street
Roseville, CA 95661	Parker Plaza, Suite 214
	Berkeley, CA 94710-2565

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

27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

9. COUNTERPARTS; FACSIMILE SIGNATURES

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

10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

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

11. ADDITIONAL POST EXECUTION ACTIVITIES

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

12. MODIFICATION

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

13. AUTHORIZATION

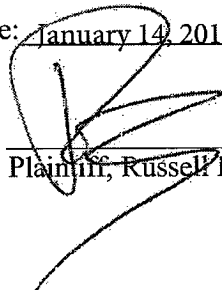
The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

AGREED TO:

AGREED TO:

Date: January 14, 2014

Date: _____

By:  _____
Plaintiff, Russell Brimer

By: _____
Defendant, Pilot Corporation of America

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

13. 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: 1/14/14

By: _____
Plaintiff, Russell Brimer

By: Kim Cooper
Defendant, Pilot Corporation of America