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6 Attorneys for Plaintiff
RUSSELL BRIMER

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA
10 UNLIMITED CIVIL JURISDICTION

11
12 RUSSELL BRIMER,

13 Plaintiff,

14 v.

15 VISUAL HORIZONS, INC.; and DOES 1-
16 150, inclusive,

17 Defendants.

Case No. RG12651439

[PROPOSED] CONSENT JUDGMENT

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

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[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Visual Horizons, Inc.**

3 This Consent Judgment is entered into by and between Russell Brimer (“Brimer” or
4 “Plaintiff”) and Visual Horizons, Inc. (“VHI” or “Defendant”), with Brimer and VHI collectively
5 referred to as the “Parties,” and each individually referred to as a Party.

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 VHI employed for a brief periods ten or more persons and during those periods of time
12 was a person in the course of doing business for purposes of the Safe Drinking Water and Toxic
13 Enforcement Act of 1986, Health & Safety Code section 25249.6 et seq. (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that VHI has distributed and/or sold in California plastic/vinyl/PVC
16 checkbook covers causing an exposure to di(2-ethylhexyl)phthalate (“DEHP”) without the
17 requisite Proposition 65 health hazard warnings.¹ DEHP is listed pursuant to Proposition 65 as a
18 chemical known to the State of California to cause birth defects and other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are plastic/vinyl/PVC checkbook
21 covers containing DEHP, including, but not limited to, the *ScrapSMART Variety Pack Plastic*
22 *Covers for Checkbook, Memo Book, Cards, Bookmark, Item #PVP1 (#8 25041 00411 0)*,
23 distributed and/or sold by VHI, directly or through others, to consumers in California
24 (“Products”).

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27 ¹ VHI represents that it is not a manufacturer or importer, as those terms are commonly defined for purposes of
28 Proposition 65 compliance and enforcement.

1 **1.6 Notice of Violation**

2 On or about July 11, 2012, Brimer served VHI and various public enforcement agencies
3 with a document entitled “60-Day Notice of Violation” (“Notice”) that provided VHI and other
4 recipients with notice of alleged violations of Proposition 65 for failing to warn consumers that
5 the Products exposed users in California to DEHP. To the best of the Parties knowledge, no
6 public enforcer has commenced and is diligently prosecuting the allegations set forth in the
7 Notice.

8 **1.7 Complaint**

9 On October 10, 2012, Brimer filed a complaint in Alameda County Superior Court against
10 VHI and Does 1 through 150 (the “Complaint” or “Action”), alleging violations of Proposition
11 65, based on the alleged exposures to DEHP contained in the Products sold by VHI to consumers
12 in California.

13 **1.8 No Admission**

14 This Consent Judgment resolves claims that are denied and disputed by Defendant. The
15 Parties enter into this Consent Judgment pursuant to a full and final settlement of claims between
16 the Parties for the purpose of avoiding prolonged litigation. VHI denies the material factual and
17 legal allegations contained in the Notice and Complaint and maintains that all products that it has
18 distributed and/or sold in California, including the Products, have been, and are, in compliance
19 with all laws, and are completely safe for use despite the alleged presence of DEHP. Nothing in
20 this Consent Judgment shall be construed as an admission by VHI of any fact, finding, conclusion
21 of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
22 constitute or be construed as an admission by VHI of any fact, finding, conclusion of law, issue of
23 law, or violation of law, such being specifically denied by VHI. However, this Section shall not
24 diminish or otherwise affect VHI’s obligations, responsibilities and duties under this Consent
25 Judgment.

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1 **1.9 Consent to Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
3 jurisdiction over VHI as to the allegations contained in the Complaint, that venue is proper in
4 Alameda County, and that this Court has jurisdiction to enter and enforce the provisions of this
5 Consent Judgment, pursuant to California Code of Civil Procedure section 664.6, as a full and
6 binding resolution of all claims that were or could have been raised in the Complaint against VHI
7 based on the facts alleged therein and in the Notice.

8 **1.10 Effective Date**

9 For purposes of this Consent Judgment, the term “Effective Date” shall mean February 15,
10 2013.

11 **2. INJUNCTIVE RELIEF**

12 As of the Effective Date VHI shall not ship, sell, distribute, or supply any Product that will
13 be sold or offered for sale to California businesses, users, or consumers unless each Accessible
14 Component (i.e., any component that can be touched, handled, or mouthed by a person during
15 reasonably foreseeable use) contains DEHP in concentration less than 1,000 parts per million
16 when analyzed pursuant to EPA sample preparation and test methodologies 3580A and 8270C
17 (the “DEHP Standard”).

18 **3. MONETARY PAYMENTS**

19 **3.1 Civil Penalties**

20 In complete settlement of all claims covered by this Consent Judgment, and in light of its
21 commitment to reformulate the Products as set forth herein, VHI shall pay a civil penalty of
22 \$3,000. Payment of this penalty by VHI shall be apportioned in accordance with Health & Safety
23 Code section 25249.12(c)(1) and (d), with 75% of the civil penalty designated for the State of
24 California’s Office of Environmental Health Hazard Assessment (“OEHHA”), and the remaining
25 25% of the penalty monies designated for Brimer.
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1 **3.2 Reimbursement of Plaintiff's Fees and Costs**

2 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
3 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
4 this fee issue to be resolved after the material terms of the agreement had been settled. The
5 Parties then attempted to (and did) reach an accord on the compensation to be paid to Brimer and
6 his counsel, which the parties agree is appropriate under general contract principles and the
7 private attorney general doctrine, codified at Code of Civil Procedure section 1021.5, for all work
8 performed in this matter. Pursuant to that accord, VHI shall pay a total of \$25,000, on or before
9 the Effective Date, to compensate Plaintiff for the fees and costs incurred investigating, litigating
10 and enforcing this matter, inclusive of all fees and costs incurred or to be incurred by Plaintiff in
11 negotiating, drafting, and obtaining the Court's approval of this Consent Judgment in the public
12 interest.

13 **3.3 Payment Procedures**

14 **3.3.1 Funds Held in Trust**

15 All payments required by Sections 3.1 and 3.2 shall delivered on or before the Effective
16 Date to either The Chanler Group or the attorney of record for VHI and shall be held in trust
17 pending the Court's approval of this Consent Judgment.

18 Payments delivered to The Chanler Group shall be made payable, as follows:

- 19 (a) One check made payable to "The Chanler Group in Trust for
20 OEHHA" in the amount of \$2,250;
21 (b) One check made payable to "The Chanler Group in Trust for
22 Russell Brimer" in the amount of \$750; and
23 (c) One check made payable to "The Chanler Group in Trust" in the
24 amount of \$25,000.

25 Payments delivered to Rogers Joseph O'Donnell shall be made payable, as follows:

- 26 (a) One check made payable to "Rogers Joseph O'Donnell in Trust
27 for OEHHA" in the amount of \$2,250;
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- (b) One check made payable to “Rogers Joseph O’Donnell in Trust for Russell Brimer” in the amount of \$750; and
- (c) One check made payable to “Rogers Joseph O’Donnell in Trust for The Chanler Group” in the amount of \$25,000.

If VHI elects to deliver payments to its attorney of record, such attorney of record shall:

(a) confirm in writing within ten days of receipt that the funds have been deposited in a trust account; and (b) within five days of the date of the hearing on which the Court approves the Consent Judgment, deliver the payment to The Chanler Group in three separate checks, as follows:

- (a) One check made payable to “The Chanler Group in Trust for OEHHA” in the amount of \$2,250;
- (b) One check made payable to “The Chanler Group in Trust for Russell Brimer” in the amount of \$750; and
- (c) One check made payable to “The Chanler Group” in the amount of \$25,000.

3.3.2 Issuance of 1099 Forms

After the Consent Judgment has been approved and the settlement funds have been transmitted to plaintiff’s counsel, VHI shall issue three separate 1099 forms, as follows:

- (a) The first 1099 shall be issued to the Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95812 (EIN: 68-0284486) in the amount of \$2,250;
- (b) The second 1099 shall be issued to Russell Brimer in the amount of \$750, whose address and tax identification number shall be furnished upon request; and
- (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-3171522) in the amount of \$25,000.

1 **3.3.3 Payment Address.**

2 All payments to the Chanler Group shall be delivered to the following payment address:

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

6 **4. CLAIMS COVERED AND RELEASED**

7 **4.1 Plaintiff's Public Release of Proposition 65 Claims**

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

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

19 Brimer, also on behalf of himself, his past and current agents, representatives, attorneys,
20 successors, and/or assignees and *not* in his representative capacity, provides a general release to
21 Defendant Releasees herein which shall be effective as a full and final accord and satisfaction, as
22 a bar to all Claims, liabilities and demands of any nature, character or kind, known or unknown,
23 suspected or unsuspected, as such claims relate to Defendant's or Defendant Releasees' sales of
24 Products containing DEHP sold or distributed by Defendant prior to the Effective Date. Brimer
25 further acknowledges that he is familiar with Civil Code § 1542, which provides as follows:

26 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
27 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT
28 TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM

1 OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
2 HER SETTLEMENT WITH THE DEBTOR.

3 Brimer, in his individual capacity only and *not* in his representative capacity, and on
4 behalf of himself, his past and current agents, representatives, attorneys, successors, and/or
5 assignees expressly waives and relinquishes any and all rights and benefits which he may have
6 under, or which may be conferred on him by the provisions of California Civil Code § 1542 as
7 well as under any other state or federal statute or common law principle of similar effect, to the
8 fullest extent that he may lawfully waive such rights or benefits pertaining to Defendant's or
9 Defendant Releasees' sales of Products containing DEHP sold or distributed by Defendant prior
10 to the Effective Date.

11 **4.3 Defendant's Release of Plaintiff**

12 Defendant on behalf of itself and its past and current agents, representatives, attorneys,
13 successors, and/or assignees, hereby waives any and all claims against Brimer, his attorneys and
14 other representatives, for any and all actions taken or statements made (or those that could have
15 been taken or made) by Brimer and his attorneys and other representatives, whether in the course
16 of investigating claims or otherwise seeking to enforce Proposition 65 against them in this matter
17 with respect to DEHP in the Products.

18 Defendant also provides a general release herein which shall be effective as a full and final
19 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
20 attorneys' fees, damages, losses, claims, liabilities and demands of Defendants of any nature,
21 character or kind, known or unknown, suspected or unsuspected, arising out of the subject matter
22 of the Action alleging the presence of DEHP in the Products. Defendant acknowledges that it is
23 familiar with Civil Code § 1542, which provides as follows:

24 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
25 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT
26 TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
27 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
28 OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
HER SETTLEMENT WITH THE DEBTOR.

1 Defendant expressly waives and relinquishes any and all rights and benefits which it may
2 have under, or which may be conferred on it by, the provisions of California Civil Code § 1542 as
3 well as under any other state or federal statute or common law principle of similar effect, to the
4 fullest extent that it may lawfully waive such rights or benefits pertaining to alleged exposures to
5 DEHP from the Products sold or distributed by Defendant prior to the Effective Date.

6 **5. COURT APPROVAL**

7 This Consent Judgment is not effective until it is approved and entered by the Court and
8 shall be null and void if, for any reason, it is not approved and entered by the Court within one
9 year after it has been fully executed by the Parties, in which event any monies that have been paid
10 to Brimer or his counsel pursuant to Sections 3 above shall be refunded within fifteen (15) days
11 after receiving written notice from VHI that the one-year period has expired.

12 **6. 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
15 provisions remaining shall not be adversely affected.

16 **7. GOVERNING LAW**

17 The terms of this Consent Judgment shall be governed by the laws of the State of
18 California and apply within the State of California. In the event that Proposition 65 is repealed or
19 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then VHI
20 shall provide written notice to Brimer of any asserted change in the law, and shall have no further
21 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products
22 are so affected.

23 **8. NOTICES**

24 Unless specified herein, all correspondence and notices required to be provided pursuant
25 to this Consent Judgment shall be in writing and sent by (i) personal delivery, (ii) first-class,
26 registered or certified mail, return receipt requested, or (iii) overnight courier on any party by the
27 other party at the following addresses:
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1 For VHI:

2 James Robert Maxwell, Esq.
3 Rogers Joseph O'Donnell
4 311 California Street, 10th Floor
5 San Francisco, CA 94104

6 *Attorneys for Visual Horizons, Inc.*

7 For Brimer:

8 Proposition 65 Coordinator
9 The Chanler Group
10 2560 Ninth Street
11 Parker Plaza, Suite 214
12 Berkeley, CA 94710

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

15 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

16 This Consent Judgment may be executed in counterparts and by facsimile or PDF
17 signature, each of which shall be deemed an original, and all of which, when taken together, shall
18 constitute one and the same document.

19 **10. POST EXECUTION ACTIVITIES**

20 Brimer agrees to comply with the reporting form requirements referenced in Health and
21 Safety Code section 25249.7(f). In addition, the Parties acknowledge that, pursuant to Health and
22 Safety Code section 25249.7, a noticed motion is required to obtain judicial approval of this
23 Consent Judgment. Brimer shall prepare and file such motion to approve this Consent Judgment,
24 and VHI shall not oppose such motion. In furtherance of obtaining such approval, Brimer and
25 VHI and their respective counsel agree to mutually employ their best efforts to support the entry
26 of this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the
27 Court in a timely manner.

28 **11. 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 **12. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment and have read,
3 understood, and agree to all of the terms and conditions of this Consent Judgment.

4 **AGREED TO:**

AGREED TO:

5
6 
7 By: _____
8 **RUSSELL BRIMER**

By: _____
Stanley Feingold, Vice President
VISUAL HORIZONS, INC.

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10 Date: January 22, 2013

Date: _____

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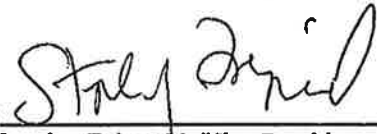
12. AUTHORIZATION

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

AGREED TO:

AGREED TO:

By: _____
RUSSELL BRIMER

By: 
Stanley Feingold, Vice President
VISUAL HORIZONS, INC.

Date: _____

Date: 1/24/13