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10 Attorneys for Defendants
TRACFONE WIRELESS, INC. and
11 STRAX AMERICAS, INC.

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF ALAMEDA
15 UNLIMITED CIVIL JURISDICTION
16

17 RUSSELL BRIMER,

18 Plaintiff,

19 v.

20 TRACFONE WIRELESS, INC.; and DOES 1-
21 150, inclusive,

22 Defendants.

Case No. RG13675860

**[PROPOSED]
CONSENT JUDGMENT**

23 Dept: 23
24 Judge: Hon. John M. True, III
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1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer”) on the one hand and, TracFone Wireless, Inc. (“TracFone”), and Strax Americas, Inc. (“Strax”) (collectively “Defendants”) on the other hand, with Brimer, TracFone and Strax collectively referred to as the “parties,” and each individually as a “party.” 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. Defendants each employ ten or more persons and each 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”).

12 **1.2 General Allegations**

13 Brimer alleges that Defendants have manufactured, imported, distributed and/or sold vinyl headset cords containing di(2-ethylhexyl)phthalate (“DEHP”) without the requisite Proposition 65 warnings. DEHP is on the Proposition 65 list as known to cause birth defects and other reproductive harm.

17 **1.3 Product Description**

18 As used in this Consent Judgment, “Products” shall mean headset cords containing DEHP including, but not limited to, the headset included in the TracFone All in One Bonus Pack, Samsung S125G (the PHF-S-PSAMT101G or TracFone ACC.HSFREE.SAQ3), manufactured, imported, distributed and/or sold by Defendants for distribution in the State of California.

22 **1.4 Notices of Violation**

23 On December 21, 2012, Brimer served TracFone and various public enforcement agencies with a document entitled “60-Day Notice of Violation” that provided recipients with notice alleging that TracFone was in violation of Proposition 65 for failing to warn consumers and customers that its vinyl headset cords exposed users in State of California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the December 21, 2012 notice.

1 On March 26, 2014, Brimer served Strax, TracFone, and various public enforcement
2 agencies, with a document entitled "Supplemental 60-Day Notice of Violation" that provided
3 recipients with notice alleging that TracFone was in violation of Proposition 65 for failing to warn
4 consumers and customers that its vinyl headset cords exposed users in State of California to DEHP.
5 The December 21, 2012 and March 26, 2014 notices shall be collectively referred to herein as the
6 "Notice". No public enforcer has diligently prosecuted the allegations set forth in the Notice.

7 **1.5 Complaint**

8 On or about April 17, 2013, Brimer filed a complaint in the Superior Court in the County of
9 Alameda against TracFone, Inc. and Does 1 through 150, *Brimer v. TracFone, Inc., et al.*, Case
10 No. RG13675860, alleging violations of Proposition 65, based on the alleged exposures to DEHP
11 contained in certain vinyl headset cords containing DEHP sold by TracFone ("Complaint"). On or
12 about August 5, 2014, Brimer filed and served an amendment to the Complaint naming Strax as Doe
13 No. 1 and a named defendant in this action for violations of Proposition 65, as alleged by Plaintiff in
14 the March 26, 2014 Supplemental 60-day Notice.

15 **1.6 No Admission**

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

24 **1.7 Consent to Jurisdiction**

25 For purposes of this Consent Judgment only, the parties stipulate that this Court has
26 jurisdiction over Defendants 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 **1.8 Execution Date**

2 For purposes of this Consent Judgment, the term “Execution Date” shall mean the date this
3 Consent Judgment is signed by all parties.

4 **1.9 Effective Date**

5 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date the
6 Court enters Judgment pursuant to the terms of this Consent Judgment.

7 **1.10 Accessible Component**

8 For purposes of this Consent Judgment, the term “Accessible Component” means a
9 component of the Products that could be touched by a person during reasonably foreseeable use.

10 **2. INJUNCTIVE RELIEF: REFORMULATION**

11 **2.1 Reformulation Standard**

12 Reformulated Products are Products containing DEHP in concentrations of less than 0.1
13 percent (1,000 parts per million) in each Accessible Component when analyzed pursuant to U.S.
14 Environmental Protection Agency testing methodologies 3580A and 8270C or any other
15 methodology utilized by federal or state agencies for the purpose of determining DEHP content in a
16 solid substance.

17 **2.2 Reformulation Commitment**

18 Commencing on September 1, 2014, all Products manufactured, produced, assembled,
19 imported, distributed, shipped, sold and/or offered by Defendants for sale in the State of California
20 shall qualify as Reformulated Products as defined in Section 2.1 above.

21 **3. MONETARY PAYMENTS**

22 **3.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

23 In settlement of all the claims referred to in this Consent Judgment, Defendants shall
24 collectively pay a total of \$14,000 in accordance with this Section. Each penalty payment will be
25 allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of
26 the funds remitted to the California Office of Environmental Health Hazard Assessment
27 (“OEHHA”) and the remaining 25% of the penalty remitted to Brimer, as follows:
28

1 3.1.1 **Initial Civil Penalty.** Within five days of the Execution Date, Defendants
2 shall collectively issue a check for the initial civil penalty payment in the amount of \$7,000 to
3 “Cox, Castle & Nicholson LLP.” Cox, Castle & Nicholson LLP shall provide The Chanler Group
4 with written confirmation within five days of receipt that the funds have been deposited in a trust
5 account. Within three business days of the Court’s approval of this Consent Judgment, Cox,
6 Castle & Nicholson LLP shall issue two separate checks for the initial civil penalty payment to:
7 (a) “OEHHA” in the amount of \$5,250; and (b) “Russell Brimer, Client Trust Account” in the
8 amount of \$1,750. All penalty payments shall be delivered to the addresses listed in Section 3.4
9 below.

10 3.1.2 **Final Civil Penalty.** Defendants shall collectively pay a final civil penalty of
11 \$7,000 on or before December 1, 2014. The final civil penalty shall be waived in its entirety if an
12 officer of Defendant Strax, on behalf of both Defendants, provides Brimer with written certification
13 that, as of the date of the certification and continuing into the future, Defendant Strax has met the
14 Reformulation Standard specified in Section 2.1 above such that pursuant to Section 2.2 above all
15 Products manufactured, produced, assembled, imported, distributed, shipped, sold or offered for sale
16 in the State of California as of December 1, 2014, and continuing into the future, are Reformulated
17 Products. Brimer must receive such certification on or before November 15, 2014, and time is of the
18 essence. Unless waived in its entirety, Defendants shall collectively issue two separate checks for
19 any remaining portion of the final civil penalty, with 75% of the funds remitted to OEHHA and the
20 remaining 25% of the funds remitted to “The Chanler Group in Trust for Russell Brimer.”
21 Defendants shall collectively be liable for payment of interest, at a rate of 10% simple interest, for
22 all amounts due and owing under this Section that are not received within two business days of the
23 due date.

24 3.2 **Representation**

25 Defendants represent that the sales data and other information concerning their size,
26 knowledge of the Listed Chemical, and prior reformulation and/or warning efforts that they provided
27 to Brimer in negotiating this Consent Judgment was truthful to their knowledge at the time of
28

1 execution of this Consent Judgment and a material factor upon which Brimer relied to determine the
2 amount of civil penalties assessed pursuant to Health & Safety Code § 25249.7.

3 **3.3 Reimbursement of Fees and Costs**

4 The parties acknowledge that Brimer and his counsel offered to resolve this dispute without
5 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
6 issue to be resolved after the material terms of the agreement had been settled. Defendants then
7 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
8 finalized. The parties then attempted to (and did) reach an accord on the compensation due to
9 Brimer and his counsel under general contract principles and the private attorney general doctrine
10 codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual
11 execution of this agreement, except fees that may be incurred on appeal. Defendants shall, within
12 five days of the Execution Date, collectively issue a check payable to “Cox, Castle & Nicholson
13 LLP” in the amount of \$31,000 to be held in trust by Cox, Castle & Nicholson LLP for The Chanler
14 Group. Cox, Castle & Nicholson LLP shall provide The Chanler Group with written confirmation
15 within five days of receipt that the funds have been deposited in a trust account. Within three
16 business days of the Court’s approval of this Consent Judgment, Cox, Castle & Nicholson LLP
17 shall issue a check payable to “The Chanler Group” to the address found in Section 3.4 below.

18 **3.4 Payment Procedures**

19 **3.4.1. Issuance of Payments.** Payments shall be delivered as follows:

20 (a) All payments owed to Brimer and his counsel, pursuant to Sections
21 3.1 through 3.3, shall be delivered to the following payment address:

22 The Chanler Group
23 Attn: Proposition 65 Controller
24 2560 Ninth Street
25 Parker Plaza, Suite 214
26 Berkeley, CA 94710
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1 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to
2 Section 3.1, shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at the
3 following addresses:

4 For United States Postal Service Delivery:

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

10 For Non-United States Postal Service Delivery:

11 Mike Gyurics
12 Fiscal Operations Branch Chief
13 Office of Environmental Health Hazard Assessment
14 1001 I Street
15 Sacramento, CA 95814

16 **3.4.2 Proof of Payment to OEHHA.** Defendants shall mail a copy of each check
17 payable to OEHHA, simultaneous with payment, to The Chanler Group at the address set forth in
18 Section 3.4.1(a) above, as proof of payment to OEHHA.

19 **3.4.3 Tax Documentation.** Defendants shall issue a separate 1099 form for each
20 payment required by this Section to: (a) Russell Brimer, whose address and tax identification
21 number shall be furnished upon request after this Consent Judgment has been fully executed by the
22 Parties; (b) OEHHA, who shall be identified as "California Office of Environmental Health Hazard
23 Assessment" (EIN: 68-0284486) in the 1099 form, to be delivered directly to OEHHA, P.O. Box
24 4010, Sacramento, CA 95814; and (c) "The Chanler Group" (EIN: 94-3171522) to the address set
25 forth in Section 3.4.1(a) above.

26 4. CLAIMS COVERED AND RELEASED

27 4.1 Brimer's Release of TracFone and Strax

28 Brimer, acting on his own behalf and in the public interest, waives all rights to institute or
participate in, directly or indirectly, any form of legal action and releases Defendants, including
their parents, subsidiaries, affiliated entities, successors, suppliers, contract manufacturers, and/or
assignees, that are under common ownership, directors, officers, employees, shareholders,
attorneys, and each entity to whom Defendants directly or indirectly distribute or sell Products,

1 including, but not limited to, downstream distributors, wholesalers, customers, retailers,
2 franchisees, cooperative members, licensors, and licensees (“Defendant Releasees”), from all
3 claims including, without limitation, all actions and causes of action in law or in equity, suits,
4 liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses, investigation
5 fees, expert fees, and attorneys’ fees of any nature whatsoever arising from any violation of
6 Proposition 65 up through the Effective Date based on exposure to DEHP from the Products.
7 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
8 with respect to exposures to DEHP from the Products as set forth in the Notice.

9 Brimer, also, in his individual capacity only and *not* in his representative capacity, provides
10 a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
11 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,
12 liabilities and demands of Brimer of any nature, character or kind, whether known or unknown,
13 suspected or unsuspected, limited to and arising out of alleged or actual exposures to the DEHP in
14 the Products manufactured, imported, distributed and/or sold by Defendant Releasees for sale in
15 the State of California prior to the Effective Date.

16 Brimer acknowledges that he is familiar with Section 1542 of the California Civil Code,
17 which provides as follows:

18 A general release does not extend to claims which the creditor does not
19 know or suspect to exist in his or her favor at the time of executing the
20 release, which if known by him or her must have materially affected his
21 or her settlement with the debtor.

22 Brimer, in his individual capacity only and *not* in his representative capacity, expressly waives and
23 relinquishes any and all rights and benefits which he may have under, or which may be conferred on
24 him by the provisions of Section 1542 of the California Civil Code, as well as under any other state
25 or federal statute or common law principle of similar effect, to the fullest extent that he may lawfully
26 waive such rights or benefits pertaining to the released matters. In furtherance of such intention, the
27 release hereby given shall be and remain in effect as a full and complete release notwithstanding the
28 discovery or existence of any such additional or different claims or facts arising out of or associated
with the Products, manufactured, distributed, sold and/or offered for sale by Defendants prior to the
Effective Date.

1 **4.2 TracFone’s and Strax’s Release of Brimer**

2 Defendants on behalf of themselves, their past and current agents, representatives,
3 attorneys, successors, and/or assignees, hereby waive any and all claims against Brimer, his
4 attorneys and other representatives, for any and all actions taken or statements made (or those that
5 could have been taken or made) by Brimer and his attorneys and other representatives, whether in
6 the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this
7 matter with respect to the Products.

8 Defendants acknowledge that they are familiar with Section 1542 of the California Civil
9 Code, which provides as follows:

10 A general release does not extend to claims which the creditor does not
11 know or suspect to exist in his or her favor at the time of executing the
 release, which if known by him or her must have materially affected his
 or her settlement with the debtor.

12 Defendants expressly waive and relinquish any and all rights and benefits which they may have
13 under, or which may be conferred on it by, the provisions of Section 1542 of the California Civil
14 Code, as well as under any other state or federal statute or common law principle of similar effect, to
15 the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters.
16 In furtherance of such intention, the release hereby given shall be and remain in effect as a full and
17 complete release notwithstanding the discovery or existence of any such additional or different
18 claims or facts arising out of the released matters.

19 **5. COURT APPROVAL**

20 This Consent Judgment is not effective until it is approved and entered by the Court and shall
21 be null and void if, for any reason, it is not approved and entered by the Court within one year after
22 it has been fully executed by all parties. In the event the Court does not approve this Consent
23 Judgment within one year, any funds paid pursuant to Section 3 of this Consent Judgment shall be
24 returned to Strax.

25 Brimer, TracFone and Strax agree to support the entry of this agreement as a Consent
26 Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. The
27 Parties acknowledge that, pursuant to California Health & Safety Code § 25249.7, a noticed motion
28 is required to obtain judicial approval of this Consent Judgment, which Brimer shall draft and file.

1 If any third-party objection to the noticed motion is filed, Brimer, TracFone and Strax shall work
2 together to file a reply and appear at any hearing before the Court. This provision is a material
3 component of the Consent Judgment.

4 **6. GOVERNING LAW**

5 The terms of this Consent Judgment shall be governed by the laws of the State of California
6 and the obligations of Defendants hereunder as to the Products apply only within the State of
7 California. In the event that Proposition 65 is repealed, preempted or is otherwise rendered
8 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
9 rendered inapplicable or no longer required as a result of any such repeal or preemption or rendered
10 inapplicable by reason of law generally as to the Products, then Defendants shall notify Brimer and
11 his counsel and may have no further obligations pursuant to this Consent Judgment with respect to,
12 and to the extent that, the Products are so affected. Nothing in this Consent Judgment shall be
13 interpreted to relieve Defendants from any obligation to comply with any pertinent state or federal
14 toxics control law.

15 **7. NOTICES**

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

20 To Brimer:

21 Proposition 65 Coordinator
22 The Chanler Group
23 2560 Ninth Street
24 Parker Plaza, Suite 214
25 Berkeley, CA 94710-2565

26 To TracFone:

27 Frederick Pollak, President
28 TracFone Wireless, Inc.
9700 NW 112th Avenue
Miami, FL 33178

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To Strax:

Paul Dryke, Director or Operations
Strax Americas, Inc.
105 Choctaw Circle
Chanhasen, MN 55317

With a copy to:

Perry S. Hughes, Esq.
Cox, Castle & Nicholson LLP
2049 Century Park East, 28th Floor
Los Angeles, CA 90067-3284

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.

8. COUNTERPARTS; FACSIMILE/PDF 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.

9. 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).

10. 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.

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11. 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.

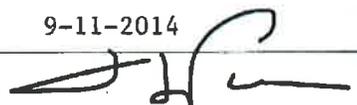
AGREED TO:

AGREED TO:

Date: September 10, 2014

Date: 9-11-2014

By:  _____
Plaintiff, Russell Brimer

By:  _____
Frederick Pollak, President
Defendant, TracFone Wireless, Inc.

Date:

By: _____

Strax Americas, Inc.

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11. 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:

Date: _____

Date: _____

By: _____
Plaintiff, Russell Brimer

By: _____
Frederick Pollak, President
Defendant, TracFone Wireless, Inc.

Date: 9/15/14

By:  _____
PAUL DELYSE
Strax Americas, Inc.