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6 RUSSELL BRIMER

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE CITY AND COUNTY OF SAN FRANCISCO
10 UNLIMITED CIVIL JURISDICTION

11
12 RUSSELL BRIMER,

13 Plaintiff,

14 v.

15 JACK RICHESON & COMPANY, INC.;;
16 and DOES 1-150, inclusive,

17 Defendants.

Case No. CGC-13-529402

[PROPOSED] CONSENT JUDGMENT

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

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Jack Richeson & Company, Inc.**

3 This Consent Judgment is entered into by and between Russell Brimer (“Brimer” or
4 “Plaintiff”) on the one hand, and Jack Richeson & Company, Inc. (“Richeson” or “Defendant”)
5 on the other hand, with Brimer and Richeson collectively referred to as the “Parties,” and each
6 individually referred to as a Party.

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

12 Richeson employs ten or more persons and is a person in the course of doing business for
13 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety
14 Code § 25249.6 et seq. (“Proposition 65”).

15 **1.4 General Allegations**

16 Brimer alleges that Defendant has sold in the State of California, without the requisite
17 Proposition 65 health hazard warning, vinyl/PVC art supply pouches containing di(2-
18 ethylhexyl)phthalate (“DEHP”), which is listed pursuant to Proposition 65 as a chemical known
19 to the State of California to cause birth defects and other reproductive harm. DEHP shall be
20 referred to as the “Listed Chemical.” Defendant denies Brimer’s allegations and denies that it has
21 or had any obligation to provide warnings under Proposition 65 or otherwise, as set forth below.

22 **1.5 Product Description**

23 The products covered by this Consent Judgment are vinyl/PVC art supply pouches,
24 including, but not limited to, the *Deluxe Pottery Tool Set 12 Pieces, #210575 (# 7 17304 11729*
25 *6)*, containing the Listed Chemical, and that are sold or offered for sale in California by
26 Defendant or by any reseller who acquires goods directly or indirectly from Defendant
27 (collectively “Products”). To the best of Richeson’s knowledge, the SKUs for the Products are:
28

1 210408, 210570, 210575, 210590, 400283, 400284, S1439724, S1439725 and S1439726, but the
2 Products may be sold by others with different SKUs.

3 **1.6 Notice of Violation**

4 On or about December 21, 2012, Brimer served Defendant and various public prosecutors
5 with a “60-Day Notice of Violation” (“Notice”), alleging that Defendant was in violation of
6 Proposition 65 for failing to warn its customers and consumers that the Products containing the
7 Listed Chemical, sold by Defendant in California, expose consumers to the Listed Chemical. To
8 the best of the Parties’ knowledge, no public enforcer has commenced and is diligently
9 prosecuting the allegations set forth in the Notice.

10 **1.7 Complaint**

11 On March 11, 2013, Brimer filed a complaint in San Francisco County Superior Court
12 against Defendant and Does 1 through 150 (the “Complaint” or “Action”), alleging violations of
13 Proposition 65, based on the alleged exposures to the Listed Chemical contained in certain
14 Products sold by Defendant to consumers in California.

15 **1.8 No Admission**

16 Defendant denies the material, factual, and legal allegations contained in the Notice and
17 the Complaint and maintains that all of the products it has sold in California, directly or
18 indirectly, including but not limited to the Products, have been, and are, safe and in compliance
19 with all laws. Nothing in this Consent Judgment shall be construed as an admission by Defendant
20 or any other person released by this Consent Judgment of any fact, finding, conclusion of law,
21 issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be
22 construed as an admission by Defendant or any other person released by this Consent Judgment of
23 any fact, finding, conclusion of law, issue of law, or violation of law, such being specifically
24 denied by Defendant. This Section shall not, however, diminish or otherwise affect Defendant’s
25 obligations, responsibilities, and duties under this Consent Judgment.

26 **1.9 Consent to Jurisdiction**

27 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
28 jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper

1 in the City and County of San Francisco, and that this Court has jurisdiction to enter and enforce
2 the provisions of this Consent Judgment, pursuant to California Code of Civil Procedure § 664.6,
3 as a full and binding resolution of all claims that were or could have been raised in the Complaint
4 against Defendant with respect to the Products based on the facts alleged therein and in the
5 Notice.

6 **1.10 Effective Date**

7 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date this
8 Consent Judgment is entered by the Court.

9 **2. INJUNCTIVE RELIEF**

10 **2.1 Product Reformulation Standard**

11 Commencing on April 30, 2013, Richeson shall not sell, purchase for sale, import for sale,
12 or manufacture for sale, any Product that Richeson reasonably expects will be sold or offered for
13 sale to California consumers containing DEHP in concentrations exceeding 0.1 percent (1,000
14 parts per million (“ppm”)) in any Accessible Component of the Products, when analyzed pursuant
15 to any methodology utilized by federal or state agencies for the purpose of determining DEHP
16 content in a solid substance and suitable for the materials comprising the Products. “Accessible
17 Component” as used in this Consent Judgment means a component of a Product that can be
18 touched by a person during reasonably foreseeable uses of an undamaged Product.

19 **2.2 Proposition 65 Compliance**

20 Products produced, imported, sold or offered for sale in compliance with Section 2.1 of
21 this Consent Judgment shall be deemed to comply with Proposition 65 as it relates to the presence
22 of DEHP in the Products and shall be exempt from any Proposition 65 warning requirements
23 regarding DEHP. Richeson’s compliance with the injunctive terms of this Section 2 constitutes
24 compliance with Proposition 65 by all persons released by this Consent Judgment with respect to
25 DEHP as to the Products manufactured, imported and/or acquired for distribution and/or sale in
26 California by Richeson.

1 **3. MONETARY TERMS**

2 **3.1 Civil Penalties**

3 In settlement of all the claims referred to in this Consent Judgment, Defendant shall pay a
4 maximum of \$10,000 in civil penalties in accordance with this Section. Each penalty payment
5 will be allocated in accordance with Health and Safety Code § 25249.12(c)(1) and (d), with 75%
6 of the funds remitted to the California Office of Environmental Health Hazard Assessment
7 (“OEHHHA”), in the form of a check issued to “OEHHHA,” and the remaining 25% of the penalty
8 remitted to Brimer, in the form of a check made payable to “The Chanler Group in Trust for
9 Russell Brimer.”

10 **3.1.1 Initial Civil Penalty**

11 Within five days of the Effective Date, Richeson shall pay an initial civil penalty
12 of \$4,000.

13 **3.1.2 Final Civil Penalty; Waiver on Certification of Compliance**

14 On or before June 15, 2013, Richeson shall pay a final civil penalty of \$6,000,
15 except that, the final civil penalty will be waived, in its entirety, if no later than May 15, 2013,
16 Richeson provides Brimer’s counsel with written confirmation that all of the Products purchased
17 for sale by Richeson, sold by Richeson, imported for sale by Richeson, distributed for sale by
18 Richeson, or manufactured by Richeson for sale in California after April 30, 2013 comply with
19 the Reformulation Standard set forth in Section 2.

20 **3.2 Reimbursement of Brimer’s Fees and Costs**

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

1 on the Effective date, pay \$40,000 for fees and costs incurred (and to be incurred) as a result of
2 investigating, bringing this matter to Defendant’s attention, negotiating a settlement in the public
3 interest and obtaining court approval of that settlement, including this Consent Judgment.
4 Richeson shall provide its payment in the form of a check payable to “The Chanler Group,” and
5 deliver payment on or before the Effective Date at the address provided in Section 3.3.1(a). Each
6 party otherwise shall bear its own costs and attorneys’ fees.

7 **3.3 Payment Procedures**

8 **3.3.1 Issuance of Payments**

9 (a) All payments owed to Brimer, pursuant to Sections 3.1 and 3.2, shall be
10 delivered to the following address:

11 The Chanler Group
12 Attn: Proposition 65 Controller
13 2560 Ninth Street
14 Parker Plaza, Suite 214
15 Berkeley, CA 94710

16 (b) All payments owed to OEHHA pursuant to Sections 3.1, shall be delivered
17 directly to OEHHA (Subject line: “Prop 65 Penalties”) at one of the following addresses, as
18 appropriate:

19 For United States Postal Service:

20 Mike Gyrics
21 Fiscal Operations Branch Chief
22 Office of Environmental Health Hazard Assessment
23 P.O. Box 4010
24 Sacramento, CA 95812-4010

25 For delivery by other than the United States Postal Service:

26 Mike Gyrics
27 Fiscal Operations Branch Chief
28 Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

3.3.2 Proof of Payment

A copy of each check payable to OEHHA shall be mailed, simultaneous with payment, to
The Chanler Group at the address set forth above in Section 3.3.1(a), as proof of payment to
OEHHA.

1 **3.3.3 Tax Documentation**

2 Upon making each payment required by this Section 3, Defendant shall issue separate
3 1099 forms as follows: For each penalty payment to OEHHA, a 1099 shall be issued to the
4 Office of Environmental Health Hazard Assessment, 1001 I Street, Sacramento, CA 95814 (EIN:
5 68-0284486); for each penalty payment to Russell Brimer, a 1099 shall be issued to “Russell
6 Brimer,” whose address and tax identification number shall be furnished upon request after this
7 Proposed Consent Judgment is fully executed by the Parties; for each payment in reimbursement
8 of fees and costs, Defendant shall issue a separate 1099 form to “The Chanler Group” (EIN: 94-
9 3171522).

10 **4. CLAIMS COVERED AND RELEASED**

11 **4.1 Plaintiff’s Public Release of Proposition 65 Claims**

12 Plaintiff, acting on his own behalf and in the public interest, releases Richeson and each
13 person that has distributed or sold and/or offered for sale Products provided directly or indirectly
14 by Richeson including, but not limited to, downstream distributors, wholesalers, customers,
15 retailers, franchisees, cooperative members, licensors, and licensees, and all of their predecessors
16 and successors in interest, parent, subsidiary and affiliated entities under common ownership or
17 control, directors, officers, employees, agents, shareholders, members and attorneys
18 (“Releasees”), from all claims for violations of Proposition 65 with respect to all Products
19 manufactured, imported, acquired for distribution, distributed, sold, and/or offered for sale by
20 Richeson up through the Effective Date based on actual or alleged exposure to the Listed
21 Chemical from the Products as set forth in the Notice and the Complaint. Compliance with the
22 terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
23 exposures to the Listed Chemical from the Products as set forth in the Notice and the Complaint.
24 This release does not apply to any entities upstream of Richeson.

25 **4.2 Plaintiff’s Individual Release of Claims**

26 Plaintiff also, in his individual capacity only and *not* in his representative capacity,
27 provides a release herein which shall be effective as a full and final accord and satisfaction, as a
28 bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses,

1 claims, liabilities and demands of Plaintiff of any nature, character or kind, whether known or
2 unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to
3 the Listed Chemical in the Products sold by Defendant.

4 **4.3 Defendant's Release of Plaintiff**

5 Defendant, on behalf itself, its past and current agents, representatives, attorneys,
6 successors, and/or assignees, hereby waives any and all claims against Plaintiff and his attorneys
7 and other representatives, for any and all actions taken or statements made (or those that could
8 have been taken or made) by Plaintiff and his attorneys and other representatives, whether in the
9 course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this
10 matter with respect to the Products.

11 **4.4 No Other Known Claims or Violations**

12 Plaintiff and Plaintiff's counsel affirm that they are not presently aware of any violations
13 of Proposition 65 by Richeson, or for which Richeson bears legal responsibility, with respect to
14 the Products, other than those that are fully resolved and released by this Consent Judgment.

15 **5. COURT APPROVAL**

16 This Consent Judgment is not effective until it is approved and entered by the Court and
17 shall be null and void if, for any reason, it is not approved and entered by the Court within one
18 year after it has been fully executed by the Parties, in which event any monies that have been paid
19 to Brimer or his counsel pursuant to Section 3 above shall be refunded within 15 days after
20 Brimer's receipt of written notice from Defendant that the one-year period has expired, and the
21 Action shall return to *status quo ante* as if there had been no settlement, and nothing in or about
22 the settlement, this proposed Consent Judgment, or any act, agreement or statement of Richeson
23 or any other Releasee regarding the settlement or this proposed Consent Judgment shall be
24 relevant, admissible, discoverable or otherwise considered for any purpose whatsoever.

25 **6. SEVERABILITY**

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

1 **7. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the State of
3 California.

4 **8. SALES DATA**

5 Richeson, and any other entity released by this Consent Judgment, understands that the
6 sales data they provided to Brimer was a material factor upon which Brimer has relied to
7 determine the amount of civil penalties assessed pursuant to Health & Safety Code § 25249.7 in
8 this Agreement. To the best of Richeson’s knowledge, the sales data provided by Richeson to
9 Brimer is full and complete, and is a true and accurate reflection of any and all sales of the
10 Products in California during the relevant period.

11 **9. NOTICES**

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

16 For Richeson:

17 Darren Richeson
18 President
19 Jack Richeson & Company, Inc.
20 557 Marcella Street
21 P.O. Box 160
22 Kimberly, WI 54136

For Brimer:

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

Attorneys for Russell Brimer

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

23 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

1 **11. POST EXECUTION ACTIVITIES**

2 Brimer shall comply with the reporting form requirements referenced in Health and Safety
3 Code § 25249.7(f). In addition, the Parties acknowledge that, pursuant to Health and Safety Code
4 § 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment.
5 Brimer shall prepare and file such motion to approve this Consent Judgment, and Defendant shall
6 not oppose such motion. In furtherance of obtaining such approval, Brimer and Defendant and
7 their respective counsel agree to mutually employ their best efforts to support the entry of this
8 agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a
9 timely manner.

10 **12. MODIFICATION**

11 This Consent Judgment may be modified only by written agreement of the Parties or by
12 order of the Court upon a showing of good cause, as provided by law.

13 **13. ENTIRE AGREEMENT**

14 This Consent Judgment contains the sole and entire agreement and understanding of the
15 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
16 negotiations, commitments, and understandings related hereto. No representations, oral or
17 otherwise, express or implied, other than those contained herein have been made by any party
18 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
19 deemed to exist or to bind any of the Parties.

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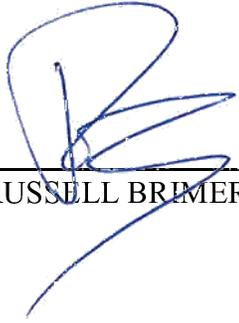
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1 **14. AUTHORIZATION**

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 **AGREED TO:**

AGREED TO:

6
7
8 By:  _____
9 RUSSELL BRIMER

By: _____
Darren Richeson, President
JACK RICHESON & COMPANY, INC.

10
11 Date: April 30, 2013 _____

Date: _____

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5 **AGREED TO:**

AGREED TO:

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7
8 By: **RUSSELL BRIMER**

9 
10 By: **Darren Richeson, President**
JACK RICHESON & COMPANY, INC.

11 Date:

12 Date: *4/30/13*

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