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ALLURE EYEWEAR, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER, Plaintiff, v. ALLURE EYEWEAR, LLC; THE TJX COMPANIES, INC.; and DOES 1-150, inclusive, Defendants.	Case No. 114CV264575 **[PROPOSED]** **CONSENT JUDGMENT** (Health & Safety Code § 25249.6 *et seq.*)

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1. INTRODUCTION

1.1 Parties

This Consent Judgment is entered into by and between plaintiff, Russell Brimer ("Brimer"), and defendant, Allure Eyewear, LLC a/k/a Allure Eyewear, L.L.C. ("Allure"), with Brimer and Allure each referred to individually as a "Party" and collectively as the "Parties."

1.2 Plaintiff

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

1.3 Defendant

Allure 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*. and related regulations ("Proposition 65" or "Prop 65").

1.4 General Allegations

Brimer alleges that Allure and The TJX Companies, Inc. have manufactured, imported, distributed, sold and/or offered for sale eyeglass cases with vinyl/PVC materials containing di(2-ethyl hexyl) phthalate ("DEHP") that cause exposures to individuals in California to DEHP. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects and other reproductive harm.

1.5 Product Description

The vinyl/PVC eyeglass cases covered by this Consent Judgment are limited to the Oscar by Oscar de la Renta, Oleg Cassini, and Lite Bright lines of vinyl/PVC eyeglass cases specifically identified at **Exhibit A** to this Consent Judgment and incorporated herein by reference, and which are hereinafter collectively referred to as the "Products".

1.6 Notice of Violation

Brimer served Allure and various public enforcement agencies with a document dated February 7, 2014 and entitled "60-Day Notice of Violation" ("Notice") that provided the recipients with notice that Allure and The TJX Companies, Inc. ("TJX") were alleged to be in violation of

Proposition 65 for failing to warn that their vinyl/PVC eyeglass cases exposed individuals in the State of California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

1.7 Complaint

On April 30, 2014, Brimer filed a complaint ("Complaint") in this Court, Case No. 114CV264575 against Allure and TJX for the alleged violations of Proposition 65 by the vinyl/PVC eyeglass cases that are the subject of the Notice ("Action").

1.8 No Admission

Allure denies the material, factual, and legal allegations contained in the Notice and Complaint, and maintains that the Products comply with all laws, including without limitation Proposition 65. The Parties acknowledge that they have entered into this Consent Judgment solely for the purposes of settlement. Nothing in this Consent Judgment or in any other communication or otherwise shall be construed as an admission of any fact, finding, conclusion of law, issue of law, liability, wrongdoing, or violation of law, regulation or order of any jurisdiction; nor shall compliance with this Consent Judgment constitute or be construed as an admission of any fact, finding, conclusion of law, issue of law, liability, wrongdoing, or violation of law, regulation, or order of any jurisdiction, the same being specifically denied by Allure. This Section shall not diminish or otherwise affect Allure's obligations, responsibilities, and duties under this Consent Judgment with respect to the Products.

1.9 Consent to Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that the above referenced court (the "Court") has jurisdiction over Allure as to the specific allegations in the Complaint, that venue is proper in Santa Clara County, and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment as a full and binding resolution of all claims that were or could have been raised in the Complaint against Allure based on the facts alleged therein and in the Notice.

1.10 Execution Date

For purposes of this Consent Judgment, the term "Execution Date" shall mean the date the Consent Judgment is signed by all Parties.

1.11 Effective Date

For purposes of this Consent Judgment, the term "Effective Date" shall mean the date the Consent Judgment is approved and entered by the Court.

2. INJUNCTIVE RELIEF: REFORMULATION AND WARNING

Commencing on the Effective Date, Allure shall only manufacture, produce, assemble, import, distribute, ship, sell or offer for sale, in California Products that are either: (1) sold or shipped with the clear and reasonable warnings set forth in subsection 2.1; or (2) exempt pursuant to Section 2.2 as Reformulated Products as defined in Section 2.3.

2.1 Clear and Reasonable Warnings

Each clear and reasonable warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which specific Product(s) the warning applies, so as to minimize the risk of consumer confusion. For purposes of this Consent Judgment, the clear and reasonable warning shall be:

> **WARNING:** This product contains DEHP, a chemical known to the State of California to cause birth defects or other reproductive harm.[1]

2.2 Exceptions to Warning Requirements

The warning requirements set forth in Section 2.1 shall not apply to Reformulated Products (as defined in Section 2.3 below).

2.3 Reformulation Standard

Reformulated Products are defined as Products containing concentrations of 0.1 percent (1000 parts per million) or less of DEHP, di-n-butyl phthalate ("DBP") and butyl benzyl phthalate ("BBP") when analyzed by a laboratory accredited by the State of California, a federal agency,

[1] If Allure seeks to use alternative warning language, other than the language specified above, it must obtain the Court's approval of its proposed alternative warning language and provide Brimer and the Office of the Attorney General with timely notice and the opportunity to comment. The prevailing Party on any motion contested by any Party related to the proposed use by Allure of alternative warning language shall be entitled to its reasonable attorneys' fees as approved by the Court.

American Association for Lab Accreditation (A2LA), ANSI-ASQ National Accreditation Board (ANAB) – ACLASS brand (an ANAB company), International Accreditation Service, Inc. (IAS), Laboratory Accreditation Bureau (L-A-B), Perry Johnson Laboratory Accreditation, Inc. (PJLA), International Laboratory Accreditation Cooperation (ILAC), or similar nationally recognized accrediting organization now or in the future (such laboratory referred hereinafter as an "Accredited Lab") pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or equivalent methodologies utilized by federal or state agencies for the purpose of determining DEHP, DBP and BBP content in a solid substance. Nothing in this Consent Judgment shall be interpreted to relieve Allure from any obligation to comply with any pertinent state or federal law or regulation other than Proposition 65 with respect to the Products.

2.4 Vendor Notification Requirement

To the extent Allure has not already done so, no more than ten (10) days after the Execution Date, Allure shall provide the reformulation standards specified in Section 2.3 for Products to any and all of its then current vendors of Products and of accessible component parts used in the Products that will be sold or offered for sale to California consumers, and shall instruct each vendor to use its best efforts to provide only Reformulated Products so long as it is supplying Allure with Products or accessible component parts used in the Products that will be sold or offered for sale to California consumers.

3. <u>MONETARY PAYMENTS</u>

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

In settlement of all the claims referred to in this Consent Judgment, Allure shall pay a total of $35,000 in civil penalties in accordance with this Section. The 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:

3.1.1 Initial Civil Penalty. Within seven (7) days after the Effective Date, Allure shall deliver payment of the civil penalty to OEHHA and Brimer in the amount of $10,000, in two separate checks made payable as follows: (a) "OEHHA" in the amount of $7,500; and (b) "Russell

Brimer, Client Trust Account" in the amount of $2,500. All penalty payments shall be delivered to the addresses listed in Section 3.3 below.

3.1.2 Second Civil Penalty. Within fifteen (15) days of the Effective Date, Allure shall pay a second civil penalty of $10,000, in two separate checks made payable as follows: (a) "OEHHA" in the amount of $7,500; and (b) "Russell Brimer, Client Trust Account" in the amount of $2,500. The second civil penalty shall be waived in its entirety, however, if, no later than ten (10) days of the Effective Date, an officer of Allure provides Brimer with written certification confirming that, as of 10 days after the Execution Date, each of Allure's vendors have been directed to reformulate Allure's Products as specified in Section 2.4 above. The certification in lieu of the second civil penalty payment provided by this Section is a material term, and time is of the essence.

3.1.3 Final Civil Penalty. Within forty-five (45) days of the Effective Date, Allure shall pay a final civil penalty of $15,000, in two separate checks made payable as follows: (a) "OEHHA" in the amount of $11,250; and (b) "Russell Brimer, Client Trust Account" in the amount of $3,750. The final civil penalty shall be waived in its entirety, however, if, no later than forty (40) days of the Effective Date, an officer of Allure provides Brimer with written certification that, as of the date of the certification, the Products meet the reformulation standard specified in Section 2.3 above, such that all Products manufactured, produced, assembled, imported, distributed, shipped, sold and offered to be shipped for sale in California by Allure are Reformulated Products and that all Products manufactured, produced, assembled, imported, distributed, shipped, sold and offered to be shipped for sale, in California by Allure will be Reformulated Products. The certification in lieu of a final civil penalty payment provided by this Section is a material term, and time is of the essence.

3.2 Reimbursement of Brimer's Fees and Costs

The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without reaching terms on the amount of attorneys' fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the material terms of the Consent Judgment had been settled. Shortly after all other settlement terms had been finalized, Allure expressed a desire to resolve the attorneys' fees and costs issue. The Parties then attempted to (and did) reach

an accord on the attorneys' fees and costs due Brimer and his counsel under general contract principles, California Code of Civil Procedure § 1032, Prop 65, the private attorney general doctrine codified at California Code of Civil Procedure § 1021.5 and other laws and sources for all work performed in this Action through the Effective Date. Within seven (7) days of the Effective Date, Allure shall pay Brimer $45,000 for fees and costs incurred in this Action. Allure shall pay this amount to The Chanler Group and shall deliver such amount to the address listed in Section 3.3.1(a) below.

3.3 Payment Procedures

3.3.1 Issuance of Payments.

(a) All payments owed to Brimer and his counsel pursuant to Sections 3.1 through 3.2 shall be delivered to the following payment address:

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

(b) All payments owed to OEHHA (EIN: 68-0284486) pursuant to Section 3.1 shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at one of the following addresses, as appropriate:

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

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

3.4 Representations

Allure represents that the sales data, product reformulation and/or knowledge of DEHP that it provided to Brimer in negotiating this Consent Judgment was truthful to its knowledge at the time of execution of this Consent Judgment and a material factor upon which Brimer relied to determine the amount of civil penalties assessed pursuant to Health & Safety Code § 25249.7.

If, within nine months of the Effective Date, Brimer discovers and presents to Allure evidence demonstrating that the preceding representation was materially inaccurate ("Evidence"), then Allure shall have 30 days to meet and confer regarding Brimer's contention. In the event the 30-day meet and confer period passes without any such resolution between Brimer and Allure, then Brimer shall be entitled to make an appropriate motion to the Court to cure any breach of Section 3.4 of the Consent Judgment pursuant to section 664.6 of the Code of Civil Procedure. The prevailing Party on the motion shall be entitled to its reasonable attorneys' fees as approved by the Court.

The parties hereby stipulate and request for the Court to retain jurisdiction over the parties to enforce the settlement until the expiration of the nine (9) months following the Effective Date pursuant to section 664.6 of the Code of Civil Procedure.

4. CLAIMS COVERED AND RELEASED

4.1 Brimer's Release of Proposition 65 Claims

Brimer, acting on his own behalf and in the public interest, releases Allure and each entity to whom Allure directly or indirectly distributes or sells the Products including, but not limited to, downstream distributors, wholesalers, customers, franchisees, cooperative members, licensees and retailers including, but not limited to, TJX (collectively, "Releasees") from all claims for violations of Proposition 65 prior to the Effective Date based on exposures to DEHP from the Products as set forth in the Notice except as provided in Section 3.4 hereinabove. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to Products as set forth in the Notice.

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

liabilities and demands of Brimer of any nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to DEHP, DBP or BBP in the Products before the Effective Date, except as provided in Section 3.4 hereinabove.

4.2 Allure's Release of Brimer

Allure, on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Brimer, his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Brimer and his attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products before the Effective Date, unless Brimer makes a motion under Section 3.4 hereinabove.

4.3 Intent of the Parties

It is the intention of the Parties to this Consent Judgment that this Consent Judgment shall be effective as of the Effective Date as a full accord and satisfaction and release of the claims released by Brimer pursuant to Section 4.1, above, and of the claims released by Allure pursuant to Section 4.2, above. In furtherance of this intention, the Parties are familiar with California Civil Code § 1542, which provides as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT 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

Allure, on the one hand, and Brimer, in his individual capacity only, and *not* in his representative capacity, on the other hand, hereby waive and relinquish all of the rights and benefits that the Parties have, or may have, under California Civil Code § 1542 (as well as any similar rights and benefits which they may have by virtue of any statute or rule of law in any other state or territory of the United States) except as provided in Section 3.4 hereinabove. The Parties hereby acknowledge that they may hereafter discover facts in addition to, or different from, those which they now know or believe to be true with respect to the subject of the Consent Judgment and the claims released

pursuant to Section 4 herein, but, notwithstanding the foregoing, it is the Parties' intention hereby to fully, finally, completely and forever settle and release each, every and all of the claims referenced in Section 4 herein, except as provided in Section 3.4 hereinabove, and that in furtherance of such intention, the releases herein given shall be and remain in effect as full and complete general releases, notwithstanding the discovery or existence of any such additional or different facts, except as provided in Section 3.4 hereinabove.

5. <u>COURT APPROVAL</u>

This Consent Judgment is not effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved and entered by the Court within one year after the Execution Date.

6. <u>SEVERABILITY</u>

If any provision (or any portion of any provision) of this Consent Judgment is held to be illegal, invalid or unenforceable under present or future laws effective during the term of this Consent Judgment, the legality validity and enforceability of the remaining provisions (or the balance of such provision) shall not be affected thereby.

7. <u>GOVERNING LAW</u>

The terms of this Consent Judgment shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or is amended or modified, or if any of the provisions of this Consent Judgment are rendered inapplicable or no longer required as a result of any such repeal, preemption, inapplicability or amendment or modification as to the Products, then Allure shall provide written notice to Brimer of any asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

8. <u>NOTICES</u>

Unless specified herein, all correspondence and notices required to be provided pursuant to this Consent Judgment shall be in writing and (i) personally delivered or (ii) sent by overnight courier, to one Party by the other Party at the following addresses:

For Allure:

Stephen Clarke, President
Allure Eyewear L.L.C.
48 West 37th Street, Room 801
New York, NY 10018

For Brimer:

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

With a copy on behalf of Allure to:

Thomas G. Redmon
Wilke, Fleury, Hoffelt, Gould & Birney, LLP
400 Capitol Mall, Twenty-Second Floor
Sacramento, California 95814

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. <u>COUNTERPARTS; FACSIMILE SIGNATURES</u>

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.

10. <u>COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)</u>

Brimer agrees to comply with the reporting form requirements referenced in California Health & Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to California Health & Safety Code § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of the settlement. In furtherance of obtaining such approval, Brimer and Allure agree to mutually employ their best efforts, and those of their counsel, to support the entry of this agreement as a Consent Judgment and to obtain judicial approval of the settlement in a timely manner. For purposes of this Section, "best efforts" shall include, at a minimum, cooperating on the drafting and filing of the necessary moving papers and supporting the motion for judicial approval. Brimer shall be responsible for filing this Consent Judgment with the Court, without any additional expense to Allure.

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11. COSTS AND EXPENSES

Except as provided in Sections 3.1 and 3.2 above, the Parties agree that each Party shall be responsible for the payment of his, her, or its own costs, attorneys' fees, and all other expenses in connection with any matter released under this Consent Judgment exclusive of fees and costs incurred on appeal, if any.

12. MODIFICATION; ENTIRE AGREEMENT

Except as provided at footnote 1 to Section 2.1 and at Section 7, this Consent Judgment may be modified only by: (i) a written agreement of the Parties and upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or application of any Party and the entry of a modified consent judgment by the Court. If a motion or application is brought under (ii) of this Section, the prevailing Party shall be entitled to its reasonable attorneys' fees as approved by the Court. This Consent Judgment sets forth the entire agreement and understanding between the Parties pertaining to the subject matter of this Consent Judgment, and supersedes all prior agreements, understandings, negotiations, representations and discussions of the Parties, whether verbal or written, pertaining to that subject matter. The Parties acknowledge that they have been advised or had the opportunity to be advised by their own independently selected counsel and other advisors in connection with this Consent Judgment, and enter into this Consent Judgment solely on the basis of that advice and on the basis of their own independent investigation of all of the facts, laws and circumstances material to this Consent Judgment, and not in any manner or to any degree based upon any statement or omission by the other Party or the other Party's counsel. The Parties each represent and warrant that they have not assigned or transferred any claims, judgments, liens, indebtedness, damages, losses, rights, demands, actions, obligations, liabilities, and causes of action released by this Consent Judgment.

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13. AUTHORIZATION

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

AGREED TO:

Date: December 8, 2014

By:_____
Russell Brimer

AGREED TO:

Date:_____

By:_____
Allure Eyewear, LLC, a/k/a Allure Eyewear, L.L.C. by Stephen Clarke, its President

13. AUTHORIZATION

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

AGREED TO:

Date:_____

By:_____
Russell Brimer

AGREED TO:

Date: 12/8/14

By:_____
Allure Eyewear, LLC, a/k/a Allure Eyewear, L.L.C. by Stephen Clarke, its President

EXHIBIT A
"Products"

Oscar by Oscar de la Renta brand:

STYLE	COLOR(S)
OSR605APM	gold; bronze
OSR506AP	grey metallic; gold
OSR506BP	pink; bronze
OSR604APM	grey metallic; bronze
OSR505AP	silver metallic zebra; brown zebra
OSR511AP	black leaf; brown leaf
OSR509AP	beige crocodile; tobacco crocodile
OSR512AP	purple woven; brown woven
OSR513AP	aqua; purple
OSR800APM	grey; black
OSR802APM	brown pebble; black pebble
OSR474AP	Bronze pebble; grey pebble
OSR474BP	Bronze pebble; purple pebble
OSR480BP	grey striated metallic; gold striated metallic
OSR484AP	gold metallic; bronze metallic
OSR505BP	tan zebra; purple zebra
OSR508AP	grey striated metallic; gold striated metallic
OSR508BP	gold striated metallic; red striated metallic
OSR508CP	red striated metallic; grey striated metallic
OSR510AP	black/ white zebra; brown/ black zebra
OSR510BP	brown/ black zebra; pink/ black zebra
OSR600APM	brown lizard; red lizard
OSR600BPM	brown lizard; purple lizard
OSR602APM	beige python; blue python
OSR602BPM	red python; black python
OSR603APM	silver zebra; tan zebra
OSR606APM	gold quilted; purple quilted

STYLE	COLOR(S)
OSR607APM	black woven; brown woven
OSR608APM	teal metallic; plum metallic
OSRS489AP	beige flower; red flower
OSRS489BP	beige flower; red flower

Oleg Cassini brand:

STYLE	COLOR(S)
CAR135AP	black quilting
CAR133AP	brown Cork

Lite Bright brand:

STYLE	COLOR(S)
LBR100C	Pink; purple
LBR100B	pink; orange
LBR100A	green; blue