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10 RUSSELL BRIMER,

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN FRANCISCO
14 UNLIMITED CIVIL JURISDICTION
15

16 RUSSELL BRIMER,

17 Plaintiff,

18 v.

19 A.J. WHOLESALE DISTRIBUTORS,
20 INC., *et al.*,

21 Defendants.

Case No. CGC15546663

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer”)
4 and defendant A.J. Wholesale Distributors, Inc. (“A.J. Wholesale”), with Brimer and A.J.
5 Wholesale each referred to individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Brimer is a resident of the State of California who seeks to promote awareness of exposures
8 to toxic chemicals, and to improve human health by reducing or eliminating harmful substances
9 contained in consumer and commercial products.

10 **1.3 Defendant**

11 A.J. Wholesale employs ten or more persons and is a person in the course of doing business
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that A.J. Wholesale manufactures, imports, sells and/or distributes for sale in
16 California, ear muffs with vinyl/PVC components containing di(2-ethylhexyl)phthalate (“DEHP”)
17 and ear muffs containing Lead, without providing the health hazard warning that Brimer alleges is
18 required by Proposition 65.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are ear muffs with vinyl/PVC components
21 containing DEHP and earmuffs containing Lead, both including, but not limited to, the *Pit Bull 3Pc*
22 *Protector Tool Set (Ear Muff)*, Item No. TAIG0150 (collectively, “Products”).

23 **1.6 Notice of Violation**

24 On March 31, 2015, Brimer served A.J. Wholesale and the requisite public enforcement
25 agencies with a 60-Day Notice of Violation (“Notice”), alleging that A.J. Wholesale violated
26 Proposition 65 when it failed to warn its customers and consumers in California that the Products
27 expose users to DEHP and Lead. To the best of the Parties’ knowledge, no public enforcer has
28 commenced and is diligently prosecuting an action to enforce the allegations set forth in the Notice.

1 **1.7 Complaint**

2 On July 1, 2015, Brimer commenced the instant action, naming A.J. Wholesale, among
3 others, as a defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

4 **1.8 No Admission**

5 A.J. Wholesale denies the material, factual, and legal allegations contained in the Notice and
6 Complaint, and maintains that all of the products that it has sold or distributed for sale in California,
7 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
8 Judgment shall be construed as an admission by A.J. Wholesale of any fact, finding, conclusion of
9 law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or
10 be construed as an admission by A.J. Wholesale of any fact, finding, conclusion of law, issue of
11 law, or violation of law. This Section shall not, however, diminish or otherwise affect A.J.
12 Wholesale’s obligations, responsibilities, and duties under this Consent Judgment.

13 **1.9 Jurisdiction**

14 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
15 jurisdiction over A.J. Wholesale as to the allegations contained in the Complaint, that venue is
16 proper in the County of San Francisco, and that the Court has jurisdiction to enter and enforce the
17 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure
18 section 664.6.

19 **1.10 Effective Date**

20 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that
21 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

22 **2. INJUNCTIVE SETTLEMENT TERMS**

23 Commencing on the Effective Date, and continuing thereafter, A.J. Wholesale shall only
24 manufacture for sale, or purchase for sale in California, Reformulated Products. For purposes of
25 this Consent Judgment, “Reformulated Products” are defined as Products with a maximum DEHP
26 concentration 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental
27 Protection Agency testing methodologies 3580A and 8270C, or other methodologies utilized by
28 state or federal agencies for the purpose of determining DEHP content in a solid substance, and

1 Products containing a maximum of 100 parts per million of Lead by weight in any accessible
2 component (i.e., any component that can be touched or handled during reasonably a foreseeable
3 use) when analyzed pursuant to Environmental Protection Agency testing methodologies 3050B
4 and/or 6010B, and that yield a result of less than 1.0 micrograms of Lead when analyzed pursuant
5 to the NIOSH 9100 testing protocol.

6 **3. MONETARY SETTLEMENT TERMS**

7 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

8 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
9 claims referred to in this Consent Judgment, A.J. Wholesale shall pay \$2,500 in civil penalties in
10 accordance with this Section. The penalty payment will be allocated in accordance with California
11 Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California
12 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
13 penalty remitted to Brimer. Brimer’s counsel shall be responsible for remitting A.J. Wholesale’s
14 penalty payment(s) under this Consent Judgment to OEHHA. A.J. Wholesale shall provide its
15 payment in a single check made payable to “Russell Brimer, Client Trust Account” to be delivered
16 to the address provided in Section 3.4, below.

17 **3.2 Reimbursement of Attorneys’ Fees and Costs**

18 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
19 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
20 to be resolved after the material terms of the agreement had been settled. Shortly after the other
21 settlement terms had been finalized, A.J. Wholesale expressed a desire to resolve Brimer’s fees
22 and costs. The Parties then negotiated a resolution of the compensation due to Brimer and his
23 counsel under general contract principles and the private attorney general doctrine codified at
24 California Code of Civil Procedure § 1021.5. For all work performed through the mutual
25 execution of this agreement and the Court’s approval of the same, but exclusive of fees and costs
26 on appeal, if any, A.J. Wholesale shall reimburse Brimer and his counsel \$23,500. A.J.
27 Wholesale’s payment shall be delivered to the address in Section 3.4 in the form of a check
28 payable to “The Chanler Group.” The reimbursement shall cover all fees and costs incurred by

1 Brimer investigating, bringing this matter to A.J. Wholesale’s attention, litigating, and negotiating
2 a settlement of the matter in the public interest.

3 **3.3 Payment Timing**

4 Within five business days of the Effective Date, A.J. Wholesale shall deliver all settlement
5 payments to Brimer’s counsel at the address provided in Section 3.4.

6 **3.4 Payment Address**

7 All payments required by this Consent Judgment shall be delivered to the following
8 address:

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

14 **4. CLAIMS COVERED AND RELEASED**

15 **4.1 Brimer’s Release of Proposition 65 Claims**

16 Brimer, acting on his own behalf and in the public interest, releases A.J. Wholesale and their
17 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
18 agents, and attorneys (“Releasees”) and each entity to whom they directly or indirectly distribute or
19 sell the Products including, but not limited to, their downstream distributors, wholesalers,
20 customers, retailers, franchisers, cooperative members, licensors and licensees (“Downstream
21 Releasees”) for any violations arising under Proposition 65 for unwarned exposures to DEHP and
22 Lead from the Products manufactured, imported, distributed or sold by A.J. Wholesale prior to the
23 Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment
24 constitutes compliance with Proposition 65 by A.J. Wholesale with respect to the alleged or actual
25 failure to warn about exposures to DEHP and Lead from Products manufactured, sold or distributed
26 for sale by A.J. Wholesale after the Effective Date.

27 **4.2 Brimer’s Individual Release of Claims**

28 Brimer, in his individual capacity only and *not* in his representative capacity, also provides a
release to Defendants, Releasees, and Downstream Releasees which shall be effective as a full and

1 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
2 attorneys' fees, damages, losses, claims, liabilities and demands of Brimer of any nature, character
3 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
4 exposures to DEHP and Lead in Products manufactured, imported, distributed or sold by A.J.
5 Wholesale before the Effective Date.

6 **4.3 A.J. Wholesale's Release of Brimer**

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

13 **5. COURT APPROVAL**

14 This Consent Judgment is not effective until it is approved and entered by the Court and
15 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
16 after it has been fully executed by the Parties. Brimer and A.J. Wholesale agree to support the entry
17 of this agreement as a judgment, and to obtain the Court's approval of their settlement in a timely
18 manner. The Parties acknowledge that, pursuant to California Health and Safety Code section
19 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which
20 motion Brimer shall draft and file and A.J. Wholesale shall support, including by appearing at the
21 hearing if so requested. If any third-party objection to the motion is filed, Brimer and A.J.
22 Wholesale agree to work together to file a reply and appear at any hearing. This provision is a
23 material component of the Consent Judgment and shall be treated as such in the event of a breach.

24 **6. SEVERABILITY**

25 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment,
26 any provision of this Consent Judgment is held by a court to be unenforceable, the validity of the
27 remaining provisions shall not be adversely affected.

28

1 **7. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the State of California
3 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
4 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then A.J.
5 Wholesale may provide Brimer with written notice of any asserted change in the law, and shall
6 have no further obligations pursuant to this Consent Judgment, with respect to, and to the extent
7 that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve
8 A.J. Wholesale from its obligation to comply with any pertinent state or federal law or regulation.

9 **8. NOTICE**

10 Unless specified herein, all correspondence and notice required by this Consent Judgment
11 shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or certified mail,
12 return receipt requested; or (iii) a recognized overnight courier to any Party by the other at the
13 following addresses:

14 To A.J. Wholesale:

15 Vuthisit Prapavat, President
16 A.J. Wholesale Distributors, Inc.
17 6925 North Paramount Boulevard #B
18 Long Beach, CA 90805

To Brimer:

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

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

21 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

22 This Consent Judgment may be executed in counterparts and by facsimile or portable
23 document format (pdf) signature, each of which shall be deemed an original and, all of which, when
24 taken together, shall constitute one and the same document.

25 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

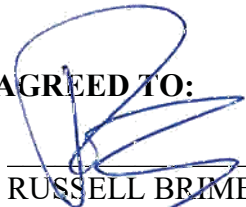
26 Brimer and his counsel agree to comply with the reporting form requirements referenced in
27 California Health and Safety Code section 25249.7(f).
28

1 **11. MODIFICATION**

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

5 **12. AUTHORIZATION**

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

9
10 **AGREED TO:**
11 
12 _____
13 RUSSELL BRIMER.

14 Dated: 5/12/2016

AGREED TO:

A.J. WHOLESALE DISTRIBUTORS, INC.

By: _____
(Print Name)

Its: _____
(Title)

Dated: _____

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7 respective Parties and have read, understood, and agree to all of the terms and conditions of this
8 Consent Judgment.

9
10 **AGREED TO:**

11 _____
12 RUSSELL BRIMER.

13 Dated: _____
14

15 **AGREED TO:**

16 _____
17 A.J. WHOLESALE DISTRIBUTORS, INC.

18 By: D. KIM PRAPATAT
19 (Print Name)

20 Its: VP.
21 (Title)

22 Dated: 2/29/16
23
24
25
26
27
28