

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and American Tombow, Inc.**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer”) and American Tombow, Inc. (“Tombow”), with Brimer and Tombow collectively referred to as the “parties,” and individually as a “party.” Brimer is an individual residing in the State of California who has asserted that he 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. Brimer alleges that Tombow 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.* (“Proposition 65”).

11 **1.2 General Allegations**

12 Brimer alleges that Tombow has manufactured, imported, distributed and/or sold vinyl/PVC pen pouches that contain 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.

16 **1.3 Product Description**

17 As used in this Consent Judgment, “Products” shall mean vinyl/PVC pen pouches including, but not limited to, CC Dual Brush Set 6 Jellybean markers (#56150), CC Dual Brush Set 6 Retro markers (#56151), CC Dual Brush Set 6 Jewel markers (#56152), CC Dual Brush Set 6 Groovy markers (#56153), CC Dual Brush Set 6 Soda Shop markers (#56154), CC Dual Brush Set 6 Grunge markers (#56155), CC Dual Brush Set 10 Jellybean markers (#56156), CC Dual Brush Set 10 Retro markers (#56157), CC Dual Brush Set 10 Jewel markers (#56158), CC Dual Brush Set 10 Groovy markers (#56159), CC Dual Brush Set 10 Soda Shop markers (#56160), CC Dual Brush Set 10 Grunge markers (#56161), Pro Dual Brush Set 6 Primary markers (#56162), Pro Dual Brush Set 6 Secondary markers (#56163), Pro Dual Brush Set 6 Landscape markers (#56164), Pro Dual Brush Set 6 Portrait markers (#56165), Pro Dual Brush Set 6 Grayscale markers (#56166), Pro Dual Brush Set 10 Primary markers (#56167), Pro Dual Brush Set 10 Secondary markers (#56168), Pro Dual Brush Set 10 Landscape markers (#56169), Pro Dual Brush Set 10 Portrait

1 markers (#56170), Pro Dual Brush Set 10 Grayscale markers (#56171), Pro Dual Brush Set 10
2 Shonen markers (#561712), Pro Dual Brush Set 10 Shojo markers (#56173), and all accessible
3 components thereto, manufactured, imported, distributed and/or sold by, or on behalf of, Tombow
4 in California. The term “accessible components” as used herein means any component of any
5 Product including, but not limited to, markers, pens and pouches that could be touched or handled
6 by a person during any reasonably foreseeable use.

7 **1.4 Notice of Violation**

8 On August 16, 2012, Brimer served Tombow and various public enforcement agencies with
9 a document entitled “60-Day Notice of Violation” (the “Notice”) that provided recipients with
10 notice alleging that Tombow was in violation of Proposition 65 for failing to warn consumers and
11 customers that the Products exposed users in California to DEHP. No public enforcer has
12 diligently prosecuted the allegations set forth in the Notice.

13 **1.5 Complaint**

14 On or about October 26, 2012, Brimer filed a complaint in the Superior Court in and for the
15 County of Alameda against American Tombow, Inc. and Does 1 through 150, *Brimer v. American*
16 *Tombow, Inc., et al.*, Case No. RG12653765, alleging violations of Proposition 65, based on the
17 alleged exposures to DEHP contained in certain vinyl/PVC pen pouches sold by Tombow
18 (“Complaint”).

19 **1.6 No Admission**

20 Tombow denies all of the factual and legal allegations contained in Brimer’s Notice and
21 Complaint related to any alleged violation of any law and maintains that it has at all times been in
22 compliance with all laws and that all products that it has sold, manufactured, imported and/or
23 distributed in California, including the Products, comply with all applicable laws. Nothing in this
24 Consent Judgment shall be construed as an admission by Tombow of any fact, finding, issue of law
25 or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as
26 an admission by Tombow of any fact, finding, conclusion, issue of law or violation of law.
27 However, this Section shall not diminish or otherwise affect Tombow’s obligations,
28 responsibilities and duties under this Consent Judgment.

1 **1.7 Consent to Jurisdiction**

2 For purposes of this Consent Judgment only, the parties stipulate that this Court has
3 jurisdiction over Tombow as to the allegations contained in the Complaint, that venue is proper in
4 the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of
5 this Consent Judgment.

6 **1.8 Execution Date**

7 For purposes of this Consent Judgment, the term “Execution Date” shall mean the date of
8 the complete execution of Consent Judgment by the Parties.

9 **1.9 Effective Date**

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

12 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

13 **2.1 Reformulation Standard**

14 As of the Effective Date, Tombow shall only manufacture, produce, assemble, import,
15 distribute, ship, offer to be shipped for sale in California, sell in California and/or offer for sale in
16 California, Products that qualify as Reformulated Products. Reformulated Products are Products
17 containing DEHP in concentrations of less than 0.1 percent (1,000 parts per million) in each
18 accessible component when analyzed pursuant to U.S. Environmental Protection Agency testing
19 methodologies 3580A and 8270C or any other methodology utilized by federal or state agencies
20 for the purpose of determining DEHP content in a solid substance. For purposes of this Section,
21 the terms “sell in California” and “offer for sale in California” excludes Products that Tombow
22 distributed, shipped or sold to any persons or entity in California prior to the Effective Date.

23 **3. MONETARY PAYMENTS**

24 **3.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

25 Tombow shall pay a total civil penalty payment of \$22,000 under this Section, as follows:

26 **3.1.1 Initial Civil Penalty.** Tombow shall pay an initial civil penalty of \$5,500

27 on or before November 30, 2012, as provided by Section 3.3.1. The initial civil penalty shall be
28 apportioned in accordance with California Health & Safety Code § 25249.12 (c) and (d), with

1 75% of these funds remitted to the State of California's Office of Environmental Health Hazard
2 Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Brimer.

3 **3.1.2 Final Civil Penalty.** Tombow shall pay a final civil penalty of \$16,500
4 within seventy-five (75) days after the Effective Date, as provided by Section 3.3.2. The final civil
5 penalty shall be waived in its entirety, however, if an officer of Tombow provides Brimer with
6 written certification that, as of the Execution Date and continuing into the future, Tombow has met
7 the Reformulation Standard specified in Section 2.1 above such that all Products manufactured,
8 produced, assembled, imported, distributed, shipped, sold or offered to ship for sale in California
9 are Reformulated Products. Brimer must receive any such certification within sixty (60) days after
10 the Effective Date, and time is of the essence. The final civil penalty shall also be apportioned in
11 accordance with California Health & Safety Code § 25249.12 (c) and (d), with 75% of these funds
12 remitted to OEHHA and the remaining 25% of the penalty remitted to Brimer.

13 **3.2 Reimbursement of Brimer's Fees and Costs**

14 The parties acknowledge that Brimer and his counsel offered to resolve this dispute
15 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
16 this fee issue to be resolved after the material terms of the agreement had been settled. Tombow
17 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms
18 had been finalized. The parties then attempted to (and did) reach an accord on the compensation
19 due to Brimer and his counsel under general contract principles and the private attorney general
20 doctrine codified at California Code of Civil Procedure § 1021.5, for all work performed in this
21 matter, except fees that may be incurred on appeal. Under these legal principles, Tombow shall
22 pay the amount of \$28,500 for fees and costs incurred investigating, litigating and enforcing this
23 matter, including the fees and costs incurred (and yet to be incurred) negotiating, drafting, and
24 obtaining the Court's approval of this Consent Judgment in the public interest.

25 **3.3 Payment Procedures**

26 **3.3.1 Initial Payments.** The payments required by Section 3.1.1 and 3.2 shall be
27 delivered on or before November 30, 2012, to The Chanler Group in three checks as follows:

- 28 (a) One check made payable to "The Chanler Group in Trust for

1 OEHHA” in the amount of \$4,125;

2 (b) One check to “The Chanler Group in Trust for Russell Brimer” in the
3 amount of \$1,375; and

4 (c) One check to “The Chanler Group” in the amount of \$28,500.

5 **3.3.2 Final Civil Penalty Payments.** If the final civil penalty of \$16,500
6 referenced in Section 3.1.2 above is not waived, payments shall be delivered within seventy-five
7 (75) days of the Effective Date to The Chanler Group in two checks, as follows:

8 (a) One check made payable to “The Chanler Group in Trust for
9 OEHHA” in the amount of \$12,375; and

10 (b) One check to “The Chanler Group in Trust for Russell Brimer” in the
11 amount of \$4,125.

12 **3.3.3 Issuance of 1099 Forms.** After the settlement funds have been transmitted
13 to Brimer’s counsel, Tombow shall issue separate 1099 forms, as follows:

14 (a) The first 1099 shall be issued to the Office of Environmental Health
15 Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN:
16 68-0284486) in the amount of \$4,125;

17 (b) The second 1099 shall be issued to Brimer in the amount of \$1,375,
18 whose address and tax identification number shall be furnished upon
19 request;

20 (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-
21 3171522) in the amount of \$28,500;

22 (d) If the penalty of \$16,500 referenced in Section 3.1.2 above is paid, a
23 fourth 1099 shall be issued to the Office of Environmental Health
24 Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN:
25 68-0284486) in the amount of \$12,375; and

26 (e) If the penalty of \$16,500 referenced in Section 3.1.2 above is paid, a
27 fifth 1099 shall be issued to Brimer in the amount of \$4,125, whose
28 address and tax identification number shall be furnished upon request.

1 **3.3.4 Payment Address.** All payments and tax information required under this
2 Section shall be delivered to Brimer’s counsel at the following address:

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

8 **4. CLAIMS COVERED AND RELEASED**

9 **4.1 Brimer’s Release of Tombow**

10 Brimer, acting on his own behalf, and on behalf of his agents, successors and assigns, and
11 in the public interest, releases Tombow, its parents, subsidiaries, affiliated entities that are under
12 common ownership, directors, officers, employees, attorneys, and each entity to whom Tombow
13 directly or indirectly distributes or sells Products, including, but not limited to, downstream
14 distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and
15 licensees who manufacture, use, maintain, distribute or sell the Products (“Releasees”), from all
16 claims for violations of Proposition 65, up through the Effective Date, based on exposure to DEHP
17 from the Products as set forth in the Notice. Compliance with the terms of this Consent Judgment
18 constitutes compliance with Proposition 65 with respect to exposures to DEHP from the Products
19 as set forth in the Notice.

20 Brimer, also, in his individual capacity, and on behalf of his agents, successors and assigns,
21 only, and *not* in his representative capacity, provides a release herein which shall be effective as a
22 full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
23 expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of Brimer of any nature,
24 character or kind, whether known or unknown, suspected or unsuspected, related to the Products
25 manufactured, distributed or sold by Tombow.

26 In furtherance of the foregoing, Brimer, on his own behalf and on behalf of his agents,
27 successors, assigns, and to every extent permitted by law, hereby waives any and all rights and
28 benefits he may now have, or in the future may have, conferred upon him with respect to the
Products by virtue of Section 1542 of the California Civil Code which provides as follows:

1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
2 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
3 EXISTS IN HIS FAVOR AT THE TIME OF THE EXECUTING
4 OF THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE
5 MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
6 DEBTOR

7 Brimer understands that the significance and consequence of this waiver of California Civil
8 Code section 1542 is that even if Brimer suffers future damages arising out of, or resulting from, or
9 related directly or indirectly to, in whole or in part, the Products, he will not be able to make any
10 claim for those damages against Tombow, its parents, subsidiaries, or affiliates, predecessors,
11 officers, directors, employees, and all of its downstream customers, distributors, wholesalers,
12 retailers or any other person in the course of doing business, and the successors and assigns of any
13 of them, who may use, maintain, distribute or sell the Products.

14 **4.2 Tombow's Release of Brimer**

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

21 In furtherance of the foregoing, Tombow, on its own behalf and on behalf of its agents,
22 successors, assigns, parents, subsidiaries, affiliates, predecessors, officers, directors, employees
23 and to every extent permitted by law, hereby waives any and all rights and benefits it may now
24 have, or in the future may have, conferred upon it with respect to the Products by virtue of Section
25 1542 of the California Civil Code which provides as follows:

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

Tombow understands that the significance and consequence of this waiver of California
Civil Code § 1542 is that even if Tombow suffers future damages arising out of the released

1 matters, it will not be able to make any claim for those damages against Brimer, his agents,
2 representatives, attorneys, successors and/or assignees, and the successors and assigns of any of
3 them, with regard to the enforcement of Proposition 65 against it in this matter with respect to the
4 Products.

5 **5. COURT APPROVAL**

6 This Consent Judgment is not effective until it is approved and entered by the Court and
7 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
8 after it has been fully executed by all parties. In the event the Court does not approve this Consent
9 Judgment within one year, the funds paid pursuant to Section 3 of this Consent Judgment shall be
10 returned to Tombow.

11 **6. SEVERABILITY**

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

15 **7. GOVERNING LAW**

16 The terms of this Consent Judgment shall be governed by the laws of the State of California
17 and the obligations of Tombow hereunder as to the Products apply only within the State of
18 California. In the event that Proposition 65 is repealed, preempted or is otherwise rendered
19 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
20 rendered inapplicable or no longer required as a result of any such repeal or preemption or
21 rendered inapplicable by reason of law generally as to the Products, including, without limitation,
22 the removal of DEHP from OEHHA's list of Proposition 65 chemicals, then Tombow shall notify
23 Brimer and his counsel and may have no further obligations pursuant to this Consent Judgment
24 with respect to, and to the extent that, the Products are so affected.

25 **8. NOTICES**

26 Unless specified herein, all correspondence and notices required to be provided pursuant to
27 this Consent Judgment shall be in writing and: (i) personally delivered; (ii) sent by first-class,
28 (registered or certified mail) return receipt requested; or (iii) sent by overnight courier to one party

1 from the other party at the following addresses:

2 To Tombow:

3 Jeffery Hinn, President
4 American Tombow, Inc.
5 355 Satellite Boulevard NE, Suite 300
6 Suwanee, GA 30024

7 With a copy to:

8 Evan Dwin, Esq.
9 Troutman Sanders LLP
10 11682 El Camino Real Ste 400
11 San Diego, CA 92130

To Brimer:

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

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

14 **9. COUNTERPARTS; FACSIMILE/PDF SIGNATURES**

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

18 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

19 Brimer and his attorneys agree to comply with the reporting form requirements referenced
20 in California Health & Safety Code § 25249.7(f).

21 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

22 Brimer and Tombow agree to mutually employ their, and their counsel's, best efforts to
23 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
24 Judgment by the Court in a timely manner. The parties acknowledge that, pursuant to California
25 Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this
26 Consent Judgment, which Brimer shall draft and file, and Tombow shall not oppose. If any third
27 party objection to the noticed motion is filed, Brimer and Tombow shall work together to file a
28 joint reply or separate replies if the parties so desire and appear at any hearing before the Court.
This provision is a material component of the Consent Judgment and shall be treated as such in the
event of a breach. If the Court does not grant the motion to approve this Consent Judgment, and if
the parties choose not to pursue a modified Consent Judgment within 30 days after the Court's

1 denial of the motion to approve, then, upon remittitur, any and all payments made pursuant to
2 Section 3 of this Consent Judgment will be returned to Tombow.

3 **12. MODIFICATION**

4 This Consent Judgment may be modified only: (1) by written agreement of the parties and
5 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
6 of any party and entry of a modified Consent Judgment by the Court.

7 If the Attorney General of the State of California or Brimer permit any alternative
8 reformation standard and/or test protocol for DEHP in other products similar to the Products by
9 way of settlement or compromise with any other person in the course of doing business, or any
10 other entity, or if a reformulation standard and/or test protocol for DEHP in products similar to the
11 Products is incorporated by Brimer in any final judgment as to any other person in the course of
12 doing business, or any other entity, then Tombow shall be entitled to apply any such reformulation
13 standard and/or test protocol to the Products.

14 Tombow shall be entitled to a modification to this Consent Judgment to establish a
15 reformulation standard and/or test protocol for DEHP content in the Products consistent with any
16 "safe use determination" regarding DEHP content in the Products issued by the California
17 Environmental Protection Agency Office of Environmental Health Hazard Assessment, pursuant to
18 27 Cal. Code Regs. § 25204 or any successor regulation.

19 **13. AUTHORIZATION**

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

22 AGREED TO:

AGREED TO:

23
24 Date: 11-19-12

Date: _____

25
26 By:  _____
Plaintiff, Russell Brimer

By: _____
Jeffery Hinn, President
Defendant, American Tombow, Inc.

1 denial of the motion to approve, then, upon remittitur, any and all payments made pursuant to
2 Section 3 of this Consent Judgment will be returned to Tombow.

3 **12. MODIFICATION**

4 This Consent Judgment may be modified only: (1) by written agreement of the parties and
5 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
6 of any party and entry of a modified Consent Judgment by the Court.

7 If the Attorney General of the State of California or Brimer permit any alternative
8 reformation standard and/or test protocol for DEHP in other products similar to the Products by
9 way of settlement or compromise with any other person in the course of doing business, or any
10 other entity, or if a reformulation standard and/or test protocol for DEHP in products similar to the
11 Products is incorporated by Brimer in any final judgment as to any other person in the course of
12 doing business, or any other entity, then Tombow shall be entitled to apply any such reformulation
13 standard and/or test protocol to the Products.

14 Tombow shall be entitled to a modification to this Consent Judgment to establish a
15 reformulation standard and/or test protocol for DEHP content in the Products consistent with any
16 "safe use determination" regarding DEHP content in the Products issued by the California
17 Environmental Protection Agency Office of Environmental Health Hazard Assessment, pursuant to
18 27 Cal. Code Regs. § 25204 or any successor regulation.

19 **13. AUTHORIZATION**

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

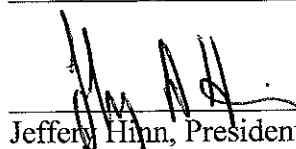
22 AGREED TO:

AGREED TO:

23
24 Date: _____

Date: 11-19-2012

25
26 By: _____
Plaintiff, Russell Brimer

27 By:  _____
Jeffrey Hinn, President
Defendant, American Tombow, Inc.