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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
16 JACK SCHWARTZ SHOES, INC.; and DOES
1-600, inclusive.

17 Defendants.
18

Case No. CGC-10-500815

**CONSENT TO JUDGMENT AS TO
DEFENDANT JACK SCHWARTZ SHOES,
INC.**

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Consent To Judgment is entered into by and between Plaintiff Russell Brimer
4 ("Brimer" or "Plaintiff") and Defendant Jack Schwartz Shoes, Incorporated ("Jack Schwartz" or
5 "Defendant"), with Brimer and Jack Schwartz collectively referred to as the "Parties."

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Jack Schwartz employs 10 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 &
13 Safety Code §§ 25249.6 *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 Brimer alleges that Jack Schwartz manufactured, distributed and/or sold, in the State of
16 California, certain types of infant footwear containing available lead on the exterior shoe surfaces,
17 such as Lugz Drifter Boots for Infants (#676730 10310 8), exposing users to lead, without first
18 providing "clear and reasonable warning" under Proposition 65. Lead is listed as a reproductive
19 and developmental toxicant pursuant to Proposition 65 and is referred to hereinafter as the "Listed
20 Chemical."

21 **1.5 Notice of Violation**

22 On December 15, 2009, Brimer served Jack Schwartz and various public enforcement
23 agencies with a document entitled "60-Day Notice of Violation" ("Notice") that provided public
24 enforcers and these entities with notice of alleged violations of Health & Safety Code § 25249.6
25 for failing to warn consumers of the presence of lead, a toxic chemical found in their infant
26 footwear sold in California. To the best of the Parties' knowledge, no public enforcer has
27 commenced and is diligently prosecuting the allegations set forth in the Notice.
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1.6 Complaint/Amended Complaints

On June 18, 2010, Brimer, acting, in the interest of the general public in California, filed a Complaint in the Superior Court in and for the City and County of San Francisco, alleging violations by Defendant of Health & Safety Code § 25249.6 based, *inter alia*, on the alleged exposures to lead contained in that certain infant footwear, Lugz Drifter Boots for Infants (#676730 10310 8) (the "Action").

1.7 No Admission

This Consent To Judgment resolves claims that are denied and disputed by Jack Schwartz. The Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all claims between the Parties for the purpose of avoiding prolonged litigation. Jack Schwartz denies the material factual and legal allegations contained in the Notice and Action, maintains that it did not knowingly or intentionally expose California consumers to lead through the reasonably foreseeable use of its products and otherwise contends that all products it has manufactured, distributed and/or sold in California have been and are in compliance with all applicable laws. Nothing in this Consent Judgment shall be construed as an admission by Jack Schwartz of any fact, finding, issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an admission by Jack Schwartz of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Jack Schwartz. However, notwithstanding the foregoing, this section shall not diminish or otherwise affect Jack Schwartz's obligations, responsibilities, and duties under this Consent Judgment.

1.8 Consent to Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Jack Schwartz as to the allegations contained in the Complaint, that venue is proper in the City and County of San Francisco, and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment. As an express part of this Agreement, pursuant to C.C.P. §664.6 the Court in which this action was filed shall retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

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2. DEFINITIONS

2.1 The term "Complaint" shall mean, collectively, the Complaint.

2.2 The term "Covered Products" means any children's footwear (including infant sizes), including, but not limited to, Lugz Drifter Boots for Infants (#676730 10310 8) manufactured, caused to be manufactured or distributed by Jack Schwartz that contains available lead on the exterior shoe surfaces or on the exterior surface of any accessory (such as laces) included as a component part of the product for sale

2.3 The term "Effective Date" shall mean August 25 2010.

3. INJUNCTIVE RELIEF

3.1 Formulation Commitment

As of the Effective Date, Jack Schwartz shall not sell, ship, or offer to be shipped for sale in California any existing inventory of any Covered Product containing more than 300 parts per million ("ppm") of lead in or on any piece, portion or component part of the product.

3.2 Warning Requirement.

Commencing on the Effective Date, Jack Schwartz shall not sell, ship, or offer to be shipped for sale in California any Covered Product that is not Lead Free without a clear and reasonable warning affixed to the packaging, labeling, or directly on each Covered Product that states:

WARNING: This product contains lead, a chemical known to the State of California to cause birth defects and other reproductive harm.

Warnings 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 of purchase or use.

For purposes of this Consent Judgment, "Lead Free" Products shall mean Products containing components that may be handled, touched or mouthed by a consumer, and which components yield less than 1.0 microgram of lead when using a wipe test pursuant to NIOSH Test

1 Method 9100, and yield less than 300 parts per million ("ppm") lead when analyzed pursuant to
2 EPA testing methodologies 3050B and 6010B, or equivalent methodologies utilized by federal or
3 state agencies for the purpose of determining lead content in a solid substance.

4 **4. MONETARY PAYMENTS**

5 **4.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

6 Subject to the potential offsets described in Section 4.2 below, Jack Schwartz shall pay a
7 total of \$6,000.00 in civil penalties to be apportioned in accordance with California Health &
8 Safety Code §25192, with 75% of these funds remitted to the State of California's Office of
9 Environmental Health Hazard Assessment and the remaining 25% of these penalty monies
10 remitted to Brimer as provided by California Health & Safety Code §25249.12(d).

11 Jack Schwartz shall issue two separate checks for this penalty payment: (a) one check
12 made payable to The Chanler Group in Trust for the State of California's Office of Environmental
13 Health Hazard Assessment ("The Chanler Group in Trust for OEHHA") in the amount of
14 \$4,500.00 for 75% of the total penalty required and (b) one check to "The Chanler Group in Trust
15 for Russell Brimer" in the amount of \$1,500.00 for the remaining 25% of the total penalty
16 required. Two separate 1099s shall be issued for the above payments: The first 1099 shall be
17 issued to OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486). The second 1099
18 shall be issued to Brimer, whose address and tax identification number shall be furnished, upon
19 request, at least five calendar days before payment is due. The payments shall be delivered on or
20 before thirty (30) days after the Effective Date, at the following address:

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

26 **4.2 Reduction in Penalty Payments**

27 Jack Schwartz may reduce the total penalty payment due pursuant to section 4.1 above by
28 satisfying the following penalty offset options (in which event the division of remaining total
penalties due shall be proportioned between OEHHA and Brimer in the same ratio as set forth in
section 4.1 above):

1 (a) a \$1,000 reduction in the total penalty amount due under section 4.1 above shall be
2 realized if, no later than thirty (30) days after the Effective Date, Jack Schwartz certifies, in a
3 writing to counsel for plaintiff that is signed by the Chief Operating Officer and/or Chairman,
4 that, as of the Effective Date, Jack Schwartz has contacted the retailer of the Covered Products,
5 Famous Footwear, and issued a "Return Authorization" for all Covered Product in its inventory.

6 (b) An additional \$1,000.00 reduction in the total penalty amount due under section 4.1
7 above shall be realized if, no later than thirty (30) days after the Effective Date, Jack Schwartz
8 certifies, in a writing to counsel for plaintiff that is signed by the Chief Operating Officer and/or
9 Chairman, that, as of the Effective Date, Jack Schwartz has implemented a testing protocol to
10 ensure that the shoe components are tested for the presence of the Listed Chemical prior to the
11 assembly of those components into Covered Product and further agrees to continue such testing
12 protocol for a period of one year after the Effective Date.

13 **4.3 Penalty Payment Terms**

14 Payment of the amount due pursuant to sections 4.1 and 4.2 shall be delivered to Brimer's
15 counsel on or before thirty (30) days after the Effective Date, at the following address:

16 The Chanler Group
17 Attn: Proposition 65 Controller
18 2560 Ninth Street
19 Parker Plaza, Suite 214
20 Berkeley, CA 94710-2565

21 **5. REIMBURSEMENT OF FEES AND COSTS**

22 **5.1 Attorney Fees and Costs**

23 5.1.1 The Parties reached an accord on the compensation due to Brimer and his
24 counsel under general contract principles and the private attorney general doctrine codified at
25 California Code of Civil Procedure (CCP) §1021.5, for all work performed through the mutual
26 execution of this agreement and approval of the Consent Judgment by the trial court, excluding
27 any fees on appeal. Jack Schwartz shall pay Brimer and his counsel a total of \$36,000.00 as
28 compromise reimbursement of a portion of the fees and costs incurred by Brimer and his counsel
as a result of investigating, bringing this matter to Jack Schwartz's attention, litigating.

1 negotiating and proposing the entry of a consent judgment in the public interest. It is expressly
2 understood that the sum of \$36,000 shall include compensation for Brimer and his counsel as
3 reimbursement for a portion of the additional attorney fees and costs that Brimer's counsel will
4 expend in drafting, filing and appearing for hearing(s) on a motion for Court approval of this
5 Consent to Judgment.

6
7 5.1.2 Payment of the amount due pursuant to section 5.1.1 shall be delivered to
8 Brimer's counsel on or before thirty (30) days after the Effective Date, at the following address:

9 The Chanler Group
10 Attn: Proposition 65 Controller
11 2560 Ninth Street
12 Parker Plaza, Suite 214
13 Berkeley, CA 94710-2565

14 **6. CLAIMS COVERED AND RELEASE**

15 **6.1 Brimer's Releases of Jack Schwartz and Related Entities**

16 6.1.1 This Consent To Judgment is a full, final, and binding resolution between
17 Brimer, on behalf of himself, his past and current agents, representatives, attorneys, successors,
18 and/or assignees, and in the interest of the general public, and Jack Schwartz, and Jack Schwartz's
19 owners, subsidiaries, affiliates, sister and related companies (including those overseas entities
20 held by its owners which manufactured or supplied the Covered Products to Jack Schwartz),
21 employees, shareholders, directors, insurers, attorneys, successors, and assigns ("Defendant
22 Releasees"), and all entities to whom Jack Schwartz directly or indirectly distributes or sells
23 Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
24 franchisees, cooperative members, and licensees ("Downstream Defendant Releasees") of any
25 violation of Proposition 65 that has been or could have been asserted against Defendant Releasees
26 and Downstream Defendant Releasees regarding the failure to warn about exposure to the Listed
27 Chemical arising in connection with Covered Products manufactured, sourced, distributed, or sold
28 by Defendant Releasees prior to the Effective Date. Jack Schwartz's compliance with this
Consent Judgment shall constitute compliance with Proposition 65 with respect to the Listed
Chemical in the Covered Products after the Effective Date.

1 6.1.2 Brimer on behalf of himself, his past and current agents, representatives,
2 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives
3 with respect to Covered Products all rights to institute or participate in, directly or indirectly, any
4 form of legal action and releases all claims, including, without limitation, all actions, and causes
5 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
6 penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and
7 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent
8 (collectively "claims"), against Defendant Releasees and Downstream Defendant Releasees that
9 arise under Proposition 65 or any other statutory or common law claims that were or could have
10 been asserted in the public interest, as such claims relate to Defendant Releasees' and
11 Downstream Defendant Releasees' alleged failure to warn about exposures to the Listed Chemical
12 contained in the Covered Products.

13 6.1.3 Brimer also, in his individual capacity only and *not* in his representative
14 capacity, provides a general release herein which shall be effective as a full and final accord and
15 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
16 damages, losses, claims, liabilities and demands of Brimer of any nature, character or kind,
17 known or unknown, suspected or unsuspected, arising out of the subject matter of the Complaint
18 as to Covered Products manufactured, distributed or sold by Defendant Releasees. Brimer
19 acknowledges that he is familiar with Section 1542 of the California Civil Code, which provides
20 as follows:

21 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES
22 NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
23 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE
24 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

24 Brimer, in his individual capacity only and *not* in his representative capacity, expressly waives
25 and relinquishes any and all rights and benefits which he may have under, or which may be
26 conferred on him by the provisions of Section 1542 of the California Civil Code as well as under
27 any other state or federal statute or common law principle of similar effect, to the fullest extent
28 that he may lawfully waive such rights or benefits pertaining to the released matters. In

1 furtherance of such intention, the release hereby given shall be and remain in effect as a full and
2 complete release notwithstanding the discovery or existence of any such additional or different
3 claims or facts arising out of the released matters.

4 6.1.4 Upon court approval of the Consent Judgment, the Parties waive their
5 respective rights to a hearing or trial on the allegations of the Complaint.

6 **6.2 Jack Schwartz's Release of Brimer**

7 6.2.1 Jack Schwartz waives any and all claims against Brimer, his attorneys, and
8 other representatives for any and all actions taken or statements made (or those that could have
9 been taken or made) by Brimer and his attorneys and other representatives, whether in the course
10 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this
11 matter, and/or with respect to the Covered Products.

12 6.2.2 Jack Schwartz also provides a general release herein which shall be
13 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
14 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
15 Jack Schwartz of any nature, character or kind, known or unknown, suspected or unsuspected,
16 arising out of the subject matter of the Action. Jack Schwartz acknowledges that it is familiar
17 with Section 1542 of the California Civil Code, which provides as follows:

18 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES
19 NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
20 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE
MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

21 Jack Schwartz expressly waives and relinquishes any and all rights and benefits
22 which it may have under, or which may be conferred on it by the provisions of Section
23 1542 of the California Civil Code as well as under any other state or federal statute or
24 common law principle of similar effect, to the fullest extent that it may lawfully waive
25 such rights or benefits pertaining to the released matters. In furtherance of such intention,
26 the release hereby given shall be and remain in effect as a full and complete release
27 notwithstanding the discovery or existence of any such additional or different claims or
28 facts arising out of the released matters.

1 **7. SEVERABILITY**

2 If, subsequent to court approval of this Consent Judgment, any of the provisions of this
3 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
4 provisions remaining shall not be adversely affected, unless the Court finds that any
5 unenforceable provision is not severable from the remainder of the Consent Judgment.

6 **8. COURT APPROVAL**

7 This Consent To Judgment is not effective until it is approved and entered by the Court
8 and shall be null and void if, for any reason, it is not approved and entered by the Court within
9 nine months after it has been fully executed by all Parties.

10 **9. GOVERNING LAW**

11 The terms of this Consent To Judgment shall be governed by the laws of the State of
12 California.

13 **10. NOTICES**

14 When any Party is entitled to receive any notice under this Consent To Judgment, the
15 notice shall be sent by certified mail and electronic mail to the following:

16 For Jack Schwartz to:

17 Ray Ricci (rricci@jssi.com)
18 Jack Schwartz Shoes, Inc.
19 155 Avenue of the Americas
New York, NY 10013

20 With copy to their counsel at

21 Norman C. Hile (nhile@orrick.com)
22 Michael Weed (mweed@orrick.com)
23 Orrick, Herrington & Sutcliffe LLP
400 Capitol Mall, Suite 3000
Sacramento, CA 95814

24 and

25 For Brimer to:

26 Proposition 65 Coordinator
27 The Chanler Group
28 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

1 Any Party may modify the person and address to whom the notice is to be sent by sending each
2 other Party notice by certified mail and/or other verifiable form of written communication.

3 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

4 Brimer agrees to comply with the reporting form requirements referenced, in California
5 Health & Safety Code §25249.7(f) and to file a motion for approval of this Consent Judgment.

6 **12. MODIFICATION**

7 This Consent Judgment may be modified only: (1) by written agreement of the Parties; or
8 (2) upon a successful motion of any party and entry of a modified Consent Judgment by the
9 Court.

10 **13. ADDITIONAL POST-EXECUTION ACTIVITIES**

11 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed
12 motion is required to obtain judicial approval of this Consent To Judgment. In furtherance of
13 obtaining such approval, Brimer and Jack Schwartz and their respective counsel agree to mutually
14 employ their best efforts to support the entry of this agreement as a Consent To Judgment and
15 obtain approval of the Consent To Judgment - sufficient to render a formal judgment approving
16 this agreement - by the Court in a timely manner. Any effort by Jack Schwartz to impede judicial
17 approval of this Consent To Judgment shall subject Jack Schwartz to liability for attorney fees
18 and costs incurred by plaintiff or his counsel in their efforts to meet or oppose Jack Schwartz'
19 impeding conduct.

20 **14. ENTIRE AGREEMENT**

21 This Consent To Judgment contains the sole and entire agreement and understanding of
22 the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
23 negotiations, commitments, and understandings related hereto. No representations, oral or
24 otherwise, express or implied, other than those contained herein have been made by any Party
25 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
26 to exist or to bind any of the Parties.

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1 **15. ATTORNEY'S FEES**

2 15.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
3 To Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs
4 unless the unsuccessful Party has acted with substantial justification. For purposes of this
5 Consent To Judgment, the term substantial justification shall carry the same meaning as used in
6 the Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016. et seq.

7 15.2 Except as specifically provided in the above paragraph and in Section 5.1, each
8 Party shall bear its own costs and attorney's fees in connection with this action.

9 15.3 Nothing in this Section 15 shall preclude a Party from seeking an award of
10 sanctions pursuant to law.

11 **16. COUNTERPARTS, FACSIMILE SIGNATURES**

12 This Consent To Judgment may be executed in counterparts and by facsimile or portable
13 document format (PDF), each of which shall be deemed an original, and all of which, when taken
14 together, shall constitute one and the same documents.

15 **17. AUTHORIZATION**

16 The undersigned parties and their counsel are authorized to execute this Consent To
17 Judgment on behalf of their respective Parties and have read, understood, and agree to all of the
18 terms and conditions of this Consent To Judgment.

19 **IT IS SO AGREED**

20 Dated: August __, 2010

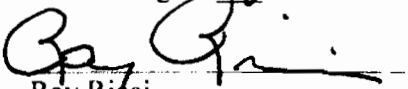
Dated: August __, 2010


21 _____
22 Plaintiff Russell Brimer

The Chanler Group
Attorneys for
Plaintiff Russell Brimer

23 _____
24 _____
25 Dated: August 28, 2010

Dated: August 31, 2010

26 
27 Ray Ricci
28 Jack Schwartz, Shoes, Inc.


Orrick, Herrington & Sutcliffe, LLP
Attorneys for
Defendant Jack Schwartz, Shoes, Inc.

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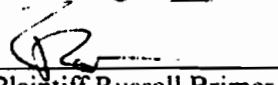
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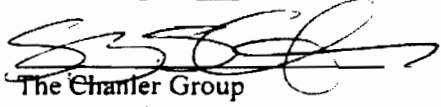
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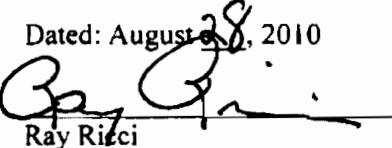
20 Dated: August 7, 2010

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22 Plaintiff Russell Brimer

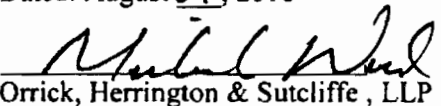
20 Dated: ^{SCPT} August 7, 2010

21 
22 The Chanler Group
23 Attorneys for
24 Plaintiff Russell Brimer

25 Dated: August 28, 2010

26 
27 Ray Ricci
28 Jack Schwartz, Shoes, Inc.

25 Dated: August 31, 2010

26 
27 Orrick, Herrington & Sutcliffe, LLP
28 Attorneys for
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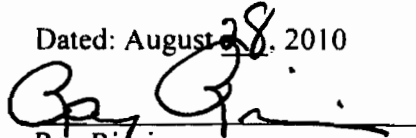
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22 _____
23 Plaintiff Russell Brimer

The Chanler Group
Attorneys for
Plaintiff Russell Brimer

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Orrick, Herrington & Sutcliffe, LLP
Attorneys for
Defendant Jack Schwartz, Shoes, Inc.