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18 Perky Pet Products, Inc.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA – HAYWARD BRANCH
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,
Plaintiff,

v.

PERKY PET PRODUCTS, INC.; LOWE'S HIW,
INC.; LOWE'S COMPANIES, INC.; and DOES
1 through 150,,
Defendants.

Case No. HG04188875

**STIPULATION AND [PROPOSED]
ORDER RE: CONSENT JUDGMENT**

1. INTRODUCTION

1.1 **Plaintiff and Settling Defendant.** This Consent Judgment is entered into by and between plaintiff Russell Brimer (hereafter "Brimer" or "Plaintiff") and defendant Perky Pet

1 Products, Inc. (hereafter “Perky Pet”). Brimer and Perky Pet are hereafter collectively referred to
2 as the “Parties” with Brimer and Perky Pet each being a “Party.”

3 **1.2 Plaintiff.** Brimer is an individual residing in Alameda County, California who
4 seeks to promote awareness of exposures to toxic chemicals and improve human health by
5 reducing or eliminating hazardous substances contained in consumer and industrial products.

6 **1.3 General Allegations.** Plaintiff alleges that Perky Pet has manufactured,
7 distributed and/or sold in the State of California glass and metal feeders that contain lead (and/or
8 lead compounds) that are listed pursuant to the Safe Drinking Water and Toxic Enforcement Act
9 of 1986, California Health & Safety Code §§ 25249.5 et seq., also known as Proposition 65, to
10 cause cancer and birth defects (or other reproductive harm). Lead (and/or lead compounds) shall
11 be referred to herein as “Listed Chemicals.”

12 **1.4 Product Descriptions.** The products that are covered by this Consent Judgment
13 are defined as follows: all glass and metal feeders containing lead manufactured, sold and/or
14 distributed by Perky Pet which were sold at Lowe’s Home Improvement Centers which were
15 owned or operated by defendant Lowe’s HIW, Inc. (hereafter “HIW”) or defendant Lowe’s
16 Companies, Inc. (hereafter “LCI”) and at other stores in California (hereafter, “Stores”) including,
17 by way of example and without limitation, the product contained in the items listed at Exhibit A.
18 Such products collectively are referred to herein as the “Products.” Perky Pet, HIW, and LCI are
19 hereafter collectively referred to as “Defendants.” HIW and LCI are hereafter referred to
20 collectively as “Lowe’s.”

21 **1.5 Notices of Violation.** Beginning on August 6, 2004, Brimer served Perky Pet,
22 HIW, LCI, and various public enforcement agencies with documents, entitled “60-Day Notice of
23 Violation” (“Notice”) that provided Defendants and such public enforcers with notice that alleged
24 that Perky Pet was in violation of Health & Safety Code § 25249.6 for failing to warn purchasers
25 that certain products that it sold expose users in California to lead (and/or lead compounds).

26 **1.6 Complaint.** On December 10, 2004, Brimer, in the interest of the general public
27 in California, filed a complaint (hereafter referred to as the “Complaint” or the “Action”) in the
28 Superior Court in and for the County of Alameda (the “Court”) against Defendants and Does 1

1 through 150, alleging violations of Health & Safety Code § 25249.6 based on the alleged
2 exposures to one or more of the Listed Chemicals contained in certain products sold at the Stores
3 which were sold by or through Perky Pet.

4 **1.7 No Admission.** Perky Pet denies the material factual and legal allegations
5 contained in Plaintiff's Notices and Complaint and maintains that all products it has sold and
6 distributed in California, including the Products, have been and are in compliance with all laws.
7 Nothing in this Consent Judgment shall be construed as an admission by Perky Pet of any fact,
8 finding, issue of law, or violation of law, nor shall compliance with this Agreement constitute or
9 be construed as an admission by Perky Pet of any fact, finding, conclusion, issue of law or
10 violation of law. However, this section shall not diminish or otherwise affect the obligations,
11 responsibilities and duties of Perky Pet under this Consent Judgment.

12 **1.8 Consent to Jurisdiction.** For purposes of this Consent Judgment only, Perky Pet
13 stipulates that the Court has jurisdiction over the allegations of violations contained in the
14 Complaint and personal jurisdiction over Perky Pet as to the acts alleged in the Complaint, that
15 venue is proper in the County of Alameda, and that the Court has jurisdiction to enter this
16 Consent Judgment and to enforce the provisions thereof.

17 **1.9 Effective Date.** For purposes of this Consent Judgment, "Effective Date" shall be
18 April 15, 2005.

19 **2. INJUNCTIVE RELIEF: PROPOSITION 65**

20 **2.1 WARNINGS AND REFORMULATION OBLIGATIONS**

21 **(a) Required Warnings.** After the Effective Date, Perky Pet shall not ship or
22 transmit (or cause to be shipped or transmitted) to any retailer or other entity in California to sell or
23 offer for sale in California any Products containing the Listed Chemicals, unless warnings are
24 given in accordance with one or more provisions in subsection 2.2 below. This restriction does
25 not prohibit Perky Pet from temporarily transshipping through or warehousing within California
26 Products which are to be sold or distributed outside California.

27 **(b) Exceptions.** The warning requirements set forth in subsections 2.1(a) and
28 2.2 below shall not apply to any Reformulated Products as defined in subsection 2.3 below.

1 2.2 **CLEAR AND REASONABLE WARNINGS**

2 (a) **Product Labeling.** A warning is affixed to the packaging, labeling or
3 directly to or on a Product by Perky Pet, its agent, or the manufacturer, importer, or distributor of
4 the Product that states:

5
6 **WARNING: The materials used on the exterior of this**
7 **product contain lead, a chemical known to the**
8 **State of California to cause birth defects or**
9 **other reproductive harm. Wash hands after**
10 **handling.**

11 or

12 **WARNING: The materials used on the exterior of the**
13 **following products contain lead, a chemical**
14 **known to the State of California to cause birth**
15 **defects or other reproductive harm. Wash**
16 **hands after handling.**

17 or

18 **WARNING: This product contains lead and lead compounds,**
19 **chemicals known to the State of California to**
20 **cause cancer and birth defects or other**
21 **reproductive harm. Wash hands after handling.**

22 As long as they are placed on the top or side of the package containing the Products,
23 warnings issued for Products pursuant to this subsection in the form identified in Exhibit "B" to
24 this Consent Judgment shall be deemed to have prominence and conspicuousness as compared
25 with other words, statements, designs, or devices sufficient to render them likely to be read and
26 understood by an ordinary individual under customary conditions of use or purchase. Any
27 changes to the language or format of the warning required by this subsection shall only be made
28 following: (1) approval of Plaintiff; (2) approval from the California Attorney General's Office,
provided that written notice of at least fifteen (15) days is given to Plaintiff for the opportunity to
comment; or (3) Court approval. This duty is prospective only.

1 (b) **Point-of-Sale Warnings.** Defendants may execute their warning
2 obligations, where applicable, through arranging for the posting of signs at retail outlets in the
3 State of California at which Products are sold, in accordance with the terms specified in
4 subsections 2.2(b)(i) and 2.2(b)(ii).

5 (i) Point of Sale warnings may be provided through one or more signs
6 posted at or near the point of sale or display of the Products that state:

7
8 **WARNING: The materials used on the exterior of this**
9 **product contain lead, a chemical known to the**
10 **State of California to cause birth defects or**
11 **other reproductive harm. Wash hands after**
12 **handling.**

13 **or**

14 **WARNING: The materials used on the exterior of the**
15 **following products contain lead, a chemical**
16 **known to the State of California to cause birth**
17 **defects or other reproductive harm. Wash**
18 **hands after handling. .**

19 **or**

20 **WARNING: This product contains lead and lead compounds,**
21 **chemicals known to the State of California to**
22 **cause cancer and birth defects or other**
23 **reproductive harm. Wash hands after handling.**

24 (ii) A point of sale warning provided pursuant to subsection 2.2(b)(i)
25 shall be prominently placed with such conspicuousness as compared with other words,
26 statements, designs, or devices as to render it likely to be read and understood by an ordinary
27 individual under customary conditions of use or purchase and shall be placed or written in a
28 manner such that the consumer understands to which *specific* Products the warnings apply so as
to minimize if not eliminate the chances that an overwarning situation will arise. Any changes to
the language or format of the warning required for Products by this subsection shall only be made
following: (1) approval of Plaintiff; (2) approval from the California Attorney General's Office,

1 provided that written notice of at least fifteen (15) days is given to Plaintiff for the opportunity to
2 comment; or (3) Court approval.

3 (iii) If Perky Pet intends to utilize point of sale warnings to comply with
4 this Consent Judgment, it must provide notice as required by this Consent Judgment to each
5 retailer to whom Perky Pet ships the Products for sale in California and obtain the written consent
6 of such retailer before shipping the Products. Such notice shall include a copy of this Consent
7 Judgment and any required warning materials (including, as appropriate, signs and/or stickers). If
8 Perky Pet has obtained the consent of a retailer, Perky Pet shall not be found to have violated this
9 Consent Judgment if it has complied with the terms of this Consent Judgment and has proof that
10 it transmitted the requisite warnings in the manner provided herein.

11 2.3 **REFORMULATION STANDARDS:** "Reformulated Products" are defined as
12 follows: any Product containing 0.1 percent (.1%) lead or less (by weight) in each material used
13 in the Products (such as solder and came).

14 **3. MONETARY PAYMENTS.**

15 3.1 **Penalties Pursuant to Health & Safety Code § 25249.7(b).** Pursuant to
16 Health & Safety Code Section 25249.7(b), Perky Pet shall pay \$18,000 in civil penalties. The
17 penalty payment shall be made payable to "Chanler Law Group in Trust For Russell Brimer," and
18 shall be delivered to Plaintiff's counsel on or before April 15, 2005, at the following address:

19
20 CHANLER LAW GROUP
21 Attn: Clifford A. Chanler
22 71 Elm Street, Suite 8
23 New Canaan, CT 06840

24 (a) In the event that Perky Pet pays any penalty and the Consent Judgment is
25 not thereafter approved and entered by the Court, Brimer shall return any penalty funds paid
26 under this agreement within fifteen (15) days of receipt of a written request from Perky Pet
27 following notice of the issuance of the Court's decision.

28 (b) The Parties agree that Perky Pet's potential interest in and ability to acquire
and market Reformulated Products is to be accounted for in this section and, since it is not a

1 remedy provided for by law, the absence of Perky Pet previously acquiring, manufacturing,
2 marketing or selling Reformulated Products is not relevant to the establishment of a penalty
3 amount pursuant to Section 3.1 above.

4 (c) **Apportionment of Penalties Received.** After Court approval of this
5 Consent Judgment pursuant to Section 6, all penalty monies received shall be apportioned by
6 Plaintiff in accordance with Health & Safety Code § 25192, with 75% of these funds remitted to
7 the State of California's Office of Environmental Health Hazard Assessment and the remaining
8 25% of these penalty monies retained by Plaintiff as provided by Health & Safety Code
9 § 25249.12(d). Plaintiff shall bear all responsibility for apportioning and paying to the State of
10 California the appropriate civil penalties paid in accordance with this section.

11 **4. REIMBURSEMENT OF FEES AND COSTS**

12 4.1 The Parties acknowledge that Plaintiff and his counsel offered to resolve this
13 dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
14 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
15 Perky Pet then expressed a desire to resolve the fee and cost issue shortly after the other
16 settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on
17 the compensation due to Plaintiff and his counsel under the private attorney general doctrine
18 codified at Code of Civil Procedure § 1021.5 for all work performed through the Effective Date
19 of the Agreement. Under the private attorney general doctrine codified at Code of Civil
20 Procedure § 1021.5, Perky Pet shall reimburse Plaintiff and his counsel for fees and costs,
21 incurred as a result of investigating, bringing this matter to Perky Pet's attention, litigating and
22 negotiating a settlement in the public interest. Perky Pet shall pay Plaintiff and his counsel
23 \$34,550.00 for all attorneys' fees, expert and investigation fees, and litigation costs. The payment
24 shall be made payable to the "Chanler Law Group" and shall be delivered to Plaintiff's counsel
25 on or before April 15, 2005, at the following address:

26 CHANLER LAW GROUP
27 Attn: Clifford A. Chanler
28 71 Elm Street, Suite 8
New Canaan, CT 06840

1 4.2 Except as specifically provided in this Consent Judgment, Defendants shall have
2 no further obligation with regard to reimbursement of Plaintiff's attorney's fees and costs with
3 regard to the Products covered in this Action.

4 **5. RELEASE OF ALL CLAIMS**

5 5.1 **Plaintiff's Release of Defendants.** In further consideration of the promises and
6 agreements herein contained, and for the payments to be made pursuant to sections 3 and 4,
7 Plaintiff, on behalf of himself, his past and current agents, representatives, attorneys, successors
8 and/or assignees, and in the interest of the general public, hereby waives all rights to institute or
9 participate in, directly or indirectly, any form of legal action and release all claims, including,
10 without limitation, all actions, causes of action, in law or in equity, suits, liabilities, demands,
11 obligations, damages, costs, fines, penalties, losses or expenses (including, but not limited to,
12 investigation fees, expert fees and attorneys' fees) of any nature whatsoever, whether known or
13 unknown, fixed or contingent (collectively "Claims"), against Defendants and each of their
14 manufacturers, distributors, wholesalers, licensors, licensees, auctioneers, retailers, dealers,
15 customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries and
16 their respective officers, directors, attorneys, representatives, shareholders, agents, and employees
17 (collectively, "Defendant Releasees") arising under Proposition 65, Business & Professions Code
18 § 17200 et seq. and Business & Professions Code § 17500 et seq., related to Defendants' or
19 Defendants' Releasees' alleged failure to warn about exposures to or identification of Listed
20 Chemicals contained in the Products.

21 The Parties further agree and acknowledge that this Consent Judgment is a full, final, and
22 binding resolution of any violation of Proposition 65, Business & Professions Code §§ 17200
23 et seq. and Business & Professions Code §§ 17500 et seq., that have been or could have been
24 asserted in the Complaints against Defendants for their alleged failure to provide clear and
25 reasonable warnings of exposure to or identification of Listed Chemicals in the Products.

26 In addition, Plaintiff, on behalf of himself, his attorneys, and their agents, waive all rights
27 to institute or participate in, directly or indirectly, any form of legal action and releases all Claims
28 against the Defendants' Releasees arising under Proposition 65, Business & Professions Code

1 §§ 17200 et seq. and Business & Professions Code §§ 17500 et seq., related to each of the
2 Defendants' Releasees' alleged failures to warn about exposures to or identification of Listed
3 Chemicals contained in the Products and for all actions or statements made by Defendants or their
4 attorneys or representatives, in the course of responding to alleged violations of Proposition 65,
5 Business & Professions Code §§ 17200 or Business & Professions Code §§ 17500 by Defendants.
6 Provided however, Plaintiff shall remain free to institute any form of legal action to enforce the
7 provisions of this Consent Judgment.

8 It is specifically understood and agreed that the Parties intend that Perky Pet's compliance
9 with the terms of this Consent Judgment resolves all issues and liability, now and in the future (so
10 long as Perky Pet complies with the terms of the Consent Judgment) concerning Perky Pet and
11 the Defendants' Releasees' compliance with the requirements of Proposition 65, Business and
12 Professions Code §§ 17200 *et seq.* and Business & Professions Code §§ 17500 *et seq.*, as to the
13 Listed Chemicals in the Products.

14 **5.2 Defendants' Release of Plaintiff.** Defendants waive all rights to institute any
15 form of legal action against Plaintiff, or his attorneys or representatives, for all actions taken or
16 statements made by Plaintiff and his attorneys or representatives, in the course of seeking
17 enforcement of Proposition 65, Business & Professions Code §§ 17200 et seq. or Business &
18 Professions Code §§ 17500 et seq. in this Action.

19 **6. COURT APPROVAL**

20 This Consent Judgment is not effective until it is approved and entered by the Court and
21 shall be null and void if, for any reason, it is not approved and entered by the Court within one
22 year after it has been fully executed by all Parties, in which event any monies that have been
23 provided to Plaintiff or his counsel pursuant to section 3 and/or section 4 above, shall be refunded
24 within fifteen (15) days.

25 **7. SEVERABILITY**

26 If, subsequent to court approval 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 **8. ATTORNEYS' FEES**

2 In the event that a dispute arises with respect to any provision(s) of this Consent
3 Judgment, the prevailing party shall, except as otherwise provided herein, be entitled to recover
4 reasonable and necessary costs and reasonable attorneys' fees incurred from the resolution of
5 such dispute.

6 **9. GOVERNING LAW**

7 The terms of this Consent Judgment shall be governed by the laws of the State of
8 California and apply within the State of California. In the event that Proposition 65 is repealed or
9 is otherwise rendered inapplicable by reason of law generally, or as to the Products specifically,
10 then Defendants shall have no further obligations pursuant to this Consent Judgment with respect
11 to, and to the extent that, those Products are so affected.

12 **10. NOTICES**

13 All correspondence and notices required to be provided pursuant to this Consent Judgment
14 shall be in writing and personally delivered or sent by: (1) first-class, registered, certified mail,
15 return receipt requested or (ii) overnight courier on either Party by the other at the following
16 addresses. (Either Party, from time to time, may, pursuant to the methods prescribed above,
17 specify a change of address to which all future notices and other communications shall be sent.)

18 To Perky Pet:

19 Robert Donegan, President
20 Perky Pet Products, Inc.
21 2201 S. Wabash Street
 Denver, CA 80231

22 With a copy to:

23 Thomas H. Cadden
24 Cadden & Fuller LLP
25 114 Pacifica, Suite 150
 Irvine, CA 92618

1 To Plaintiff:

2 Clifford A. Chanler, Esq.
3 Chanler Law Group
4 71 Elm Street, Suite 8
New Canaan, CT 06840

5 **11. NO ADMISSIONS**

6 Nothing in this Consent Judgment shall constitute or be construed as an admission by
7 Defendants of any fact, finding, conclusion, issue of law, or violation of law, nor shall
8 compliance with this Consent Judgment constitute or be construed as an admission by Defendants
9 of any fact, finding, conclusion, issue of issue of law, or violation of law, such being specifically
10 denied by Defendants. Defendants reserve all of their rights and defenses with regard to any
11 claim by any party under Proposition 65 or otherwise. However, this section shall not diminish or
12 otherwise affect Perky Pet's obligations, responsibilities and duties under this Consent Judgment.

13 **12. COUNTERPARTS; FACSIMILE SIGNATURES**

14 This Consent Judgment may be executed in counterparts and by facsimile, each of which
15 shall be deemed an original, and all of which, when taken together, shall constitute one and the
16 same document.

17 **13. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

18 Plaintiff agrees to comply with the reporting form requirements referenced in Health &
19 Safety Code § 25249.7(f). Pursuant to regulations promulgated under that section, Plaintiff shall
20 present this Consent Judgment to the California Attorney General's Office within two (2) days
21 after receiving all of the necessary signatures. A noticed motion to enter the Consent Judgment
22 will then be served on the Attorney General's Office at least forty-five (45) days prior to the date
23 a hearing is scheduled on such motion in the Superior Court for the City and County of Alameda
24 unless the Court allows a shorter period of time.

25 **14. ADDITIONAL POST EXECUTION ACTIVITIES**

26 The Parties shall mutually employ their best efforts to support the entry of this Agreement
27 as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely
28

1 manner. The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a noticed
2 motion is required to obtain judicial approval of this Consent Judgment. Accordingly, the Parties
3 agree to file a Joint Motion to Approve the Agreement (“Joint Motion”), the first draft of which
4 Perky Pet’s counsel shall prepare, within a reasonable period of time after the Execution Date
5 (*i.e.*, not to exceed thirty (30) days unless otherwise agreed to by the Parties’ counsel based on
6 unanticipated circumstances). Plaintiff’s counsel shall prepare a declaration in support of the
7 Joint Motion which shall, *inter alia*, set forth support for the fees and costs to be reimbursed
8 pursuant to Section 4. Perky Pet shall have no additional responsibility to Plaintiff’s counsel
9 pursuant to C.C.P. § 1021.5 or otherwise with regard to reimbursement of any fees and costs
10 incurred with respect to the preparation and filing of the Joint Motion and its supporting
11 declaration or with regard to Plaintiff’s counsel appearing for a hearing or related proceedings
12 thereon.

13 **15. MODIFICATION**

14 This Consent Judgment may be modified only by: (1) written agreement of the Parties
15 and upon entry of a modified Consent Judgment by the Court thereon, or (2) motion of any Party
16 as provided by law and upon entry of a modified Consent Judgment by the Court. The Attorney
17 General shall be served with notice of any proposed modification to this Consent Judgment at
18 least fifteen (15) days in advance of its consideration by the Court.

19 **16. AUTHORIZATION**

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

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1 **16. 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 **17. DISMISSAL OF CO-DEFENDANTS WITHOUT PREJUDICE**

6 Within five (5) days after notice of entry of the Consent Judgment, the Plaintiff shall
7 dismiss without prejudice LOWE'S from this action.
8
9

10 AGREED TO:

AGREED TO:

11 Date: 4.5.05

Date:

12
13 By: 
14 Plaintiff RUSSELL BRIMER

By:
Defendant
PERKY PET PRODUCTS, INC.

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16
17 **ORDER APPROVING CONSENT JUDGMENT**

18
19 **IT IS SO ORDERED.**

20
21 Date: _____

JUDGE OF THE SUPERIOR COURT

1 16. 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 17. DISMISSAL OF CO-DEFENDANTS WITHOUT PREJUDICE

6 Within five (5) days after notice of entry of this Consent Judgment, the Plaintiff shall
7 dismiss without prejudice LOWES from this action.
8
9

10 AGREED TO:

AGREED TO:

11 Date: 4.5.05

12 Date: 4/8/05

13 By: Russell Brimer
14 Plaintiff RUSSELL BRIMER

13 By: Robert W Donagan
14 Defendant
15 PERKY PET PRODUCTS, INC.

16
17 ORDER APPROVING CONSENT JUDGMENT

18
19 IT IS SO ORDERED.

20
21 Date: _____

22 _____
23 JUDGE OF THE SUPERIOR COURT
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Exhibit A

All glass and metal feeders including, but not limited to:

Garden Treasures Hummingbird Feeder, Item #193411 (#0 78978 26740 4)