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17 Attorneys for Defendant
18 PRYM CONSUMER USA INC.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,

Plaintiff,

v.

ACCO BRANDS CORPORATION, *et al.*,

Defendants.

Case No. CGC-09-485784

**CONSENT TO JUDGMENT AS TO
DEFENDANT PRYM CONSUMER USA
INC.**

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Prym Consumer USA Inc.**

3 This Consent To Judgment is entered into by and between Plaintiff Russell Brimer (hereinafter
4 “Brimer” or “Plaintiff”) and Defendant Prym Consumer USA Inc. (hereinafter “Prym” or
5 “Defendant”), with Brimer and Prym collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Prym employs ten or more persons and is a person in the course of doing business for purposes
12 of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code
13 § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that Prym has manufactured, distributed and/or sold in the State of California
16 vinyl coated tape measures containing lead on the exterior surface. Lead is listed pursuant to
17 Proposition 65 as a chemical known to the State of California to cause birth defects and other
18 reproductive harm. Lead is referred to herein as the “Listed Chemical.”

19 **1.5 Product Description**

20 The products that are covered by this Consent To Judgment are defined as follows: vinyl
21 coated tape measures containing the Listed Chemical on the exterior surface including, but not limited
22 to, *Michael's Tape Measure 10' (#0 72879 06784 2)*. All such items shall be referred to herein as the
23 “Products.”

24 **1.6 Notice of Violation**

25 On May 22, 2009, Brimer served Prym and various public enforcement agencies with a
26 document entitled “60-Day Notice of Violation” that provided Prym and such public enforcers with
27 notice that alleged that Prym was in violation of California Health & Safety Code § 25249.6 for
28 failing to warn consumers and customers that the Products exposed users in California to lead. To the

1 best of the Parties' knowledge, no public enforcer has diligently prosecuted the allegations set forth in
2 the 60-Day Notice of Violation ("Notice").

3 **1.7 Complaint**

4 On March 5, 2009, Brimer, acting, in the interest of the general public in California, filed a
5 complaint in the Superior Court in and for the City and County of San Francisco, alleging violations
6 by various defendants of Health & Safety Code § 25249.6 based, *inter alia*, on the alleged exposures
7 to lead contained in vinyl coated paper fasteners (the "Action"). Prym was not then named among the
8 defendants in the action, nor was Prym named in the subsequently filed First Amended Complaint
9 ("FAC"); however, on or about October 9, 2009, Brimer sought leave to file a Second Amended
10 Complaint ("SAC") in the Action. On November 13, 2009, Brimer filed the SAC adding Prym as a
11 defendant in the Action, and alleging that Prym violated Health & Safety Code § 25249.6 based on
12 the alleged exposures to lead contained in the exterior surface of vinyl coated tape measures
13 manufactured, distributed and/or sold by Prym.

14 **1.8 No Admission**

15 Prym denies the material, factual, and legal allegations contained in Brimer's Notice, and
16 expressly denies any wrongdoing whatsoever. Prym further maintains that all products manufactured,
17 distributed and/or sold by it in California, including the Products, have been, and are, in compliance
18 with all laws. Nothing in this Consent To Judgment shall be construed as an admission by Prym of
19 any fact, finding, issue of law, or violation of law; nor shall compliance with this Consent To
20 Judgment constitute or be construed as an admission by Prym of any fact, finding, conclusion, issue of
21 law, or violation of law, such being specifically denied by Prym. However, this section shall not
22 diminish or otherwise affect the obligations, responsibilities and duties of Prym under this Consent To
23 Judgment.

24 **1.9 Consent to Jurisdiction**

25 For purposes of this Consent To Judgment only, the parties stipulate that this Court has
26 jurisdiction over Prym as to the allegations contained in the Complaint, that venue is proper in the
27 City and County of San Francisco, and that this Court has jurisdiction to enter and enforce the
28 provisions of this Consent To Judgment pursuant to Code of Civil Procedure § 664.6.

1 **1.10 Effective Date**

2 For purposes of this Consent To Judgment, the term “Effective Date” shall mean May 31,
3 2010.

4 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNING**

5 **2.1 Reformulation Commitment:** For purposes of this Consent Judgment, “Lead Free”
6 Products shall mean Products containing components that may be handled, touched or mouthed by a
7 consumer, and which components yield less than 1.0 microgram of lead when using a wipe test
8 pursuant to NIOSH Test Method 9100, and yield less than 300 parts per million (“ppm”) lead when
9 analyzed pursuant to EPA testing methodologies 3050B and 6010B, or equivalent methodologies
10 utilized by federal or state agencies for the purpose of determining lead content in a solid substance.
11 As of August 31, 2011, however, the 300 ppm limit shall be reduced to 100 ppm; all other aspects of
12 the Reformulation Commitment shall remain unchanged. Products that are Lead Free are referred to
13 hereinafter as “Reformulated Products.”

14 **2.2 Warning Commitment:**

15 Except as to Reformulated Products, as of the Effective Date, Prym shall
16 provide clear and reasonable warnings for all Products, shipped, sold or offered for sale in California
17 as follows:

18 (a) **Retail Store Sales.**

19 (i) **Product Labeling.** Prym may affix a warning to the packaging,
20 labeling, or directly on each Product sold in retail outlets in California by Prym or its agents,
21 containing the following language:

22 **WARNING:** This product contains lead and other
23 chemicals known to the State of California
24 to cause birth defects and other reproductive
25 harm.

26 **Point-of-Sale Warnings.** Alternatively, Prym may provide warning signs in
27 the form below to its customers in California with instructions to post the warnings in close proximity
28 to the point of display of the Products.

1 **WARNING:** This product contains lead and other chemicals
2 known to the State of California to cause birth
3 defects and other reproductive harm.

4 Where more than one Product is sold in proximity to other like items or to those that do not
5 require a warning (*e.g.*, Reformulated Products as defined in Section 2.1 or Products distributed prior
6 to the Effective Date), the following statement must be used:¹

7 **WARNING:** This product contains lead and other chemicals
8 known to the State of California to cause birth
9 defects and other reproductive harm.

10 *[list products for which warning is required]*

11 The requirements set forth in this Subsection (a) shall not apply to Products that Prym shipped to its
12 customers, sold, or offered for sale in California prior to the Effective Date.

13 **(b) Mail Order Catalog and Internet Sales.** In the event that Prym sells Products
14 via mail order catalog or internet to customers located in California after the Effective Date that are
15 not Reformulated Products, Prym shall provide a warning for Products sold via mail order catalog or
16 the Internet to California residents: (1) in the mail order catalog; or (2) on the website. Warnings
17 given in the mail order catalog or on the website shall identify the specific Product to which the
18 warning applies as further specified in Sections 2.2(b)(i) and (ii). The requirements set forth in this
19 Section (b) shall not apply to mail order catalogs or internet sites of Prym's downstream distributors,
20 retailers or customers.

21 **(i) Mail Order Catalog Warning.** Any warning provided in a mail order
22 catalog must be in the same type size or larger than the Product description text within the catalog.
23 The following warning shall be provided on the same page and in the same location as the display
24 and/or description of the Product:

25 **WARNING:** This product contains lead and other chemicals
26 known to the State of California to cause birth
27 defects and other reproductive harm.

28 Where it is impracticable to provide the warning on the same page and in the same location as
the display and/or description of the Product, Prym may utilize a designated symbol to cross reference

¹For purposes of the consent judgment, "sold in proximity" shall mean that the Product and another product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

1 the applicable warning and shall define the term “designated symbol” with the following language on
2 the inside of the front cover of the catalog or on the same page as any order form for the Product(s):

3 **WARNING:** Certain products identified with
4 this symbol ▼ and offered for sale in this
5 catalog contain lead and other chemicals
6 known to the State of California to cause birth
7 defects and other reproductive harm.

8 The designated symbol must appear on the same page and in close proximity to the display
9 and/or description of the Product. On each page where the designated symbol appears, Prym must
10 provide a header or footer directing the consumer to the warning language and definition of the
11 designated symbol.

12 If Prym elects to provide warnings in the mail order catalog, then the warnings must be
13 included in all catalogs offering to sell one or more Products printed after the Effective Date.

14 **(ii) Internet Website Warning.** A warning may be given in conjunction
15 with the sale of the Product via the Internet, provided it appears either: (a) on the same web page on
16 which the Product is displayed; (b) on the same web page as the order form for the Product; (c) on the
17 same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser
18 during the checkout process. The following warning statement shall be used and shall appear in any
19 of the above instances adjacent to or immediately following the display, description, or price of the
20 Product for which it is given in the same type size or larger than the Product description text:

21 **WARNING:** This product contains lead and other chemicals
22 known to the State of California to cause birth
23 defects and other reproductive harm.

24 Alternatively, the designated symbol may appear adjacent to or immediately following the
25 display, description, or price of the Product for which a warning is being given, provided that the
26 following warning statement also appears elsewhere on the same web page, as follows:

27 **WARNING:** Products identified on this page with the
28 following symbol contain lead and other
chemicals known to the State of California to
cause birth defects and other reproductive
harm: ▼

1 **3. MONETARY PAYMENTS**

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

3 **3.1.1.** In settlement of all claims related to the Covered Products and Listed Chemical
4 referred to in the Complaint, and this Consent Judgment, pursuant to Health & Safety Code §
5 25249.7(b), Prym shall pay civil penalties as follows:

6 **3.1.1.1 Initial Civil Penalty:** Prym shall pay an initial civil penalty of
7 \$17,000 no later than ten (10) days after the Effective Date. Prym shall issue two separate checks
8 for the Initial Penalty payment pursuant to Health & Safety Code § 25192: (a) one check made
9 payable to The Chanler Group in Trust for the State of California's Office of Environmental Health
10 Hazard Assessment (OEHHA) in the amount of \$12,750, representing 75% of the total; and (b) one
11 check to The Chanler Group in Trust for Brimer in the amount of \$4,250, representing 25% of the
12 total. Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to
13 OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of \$12,750. The
14 second 1099 shall be issued in the amount of \$4,250 to Brimer, whose address and tax identification
15 number shall be furnished, upon execution of this Agreement. The payments shall be delivered
16 within ten (10) days of the Effective Date, to the following address:

17
18
19 The Chanler Group
20 Attn: Proposition 65 Controller
21 2560 Ninth Street
22 Parker Plaza, Suite 214
23 Berkeley, CA 94710-2565

24 **3.1.1.2 Final Civil Penalty:** Prym shall pay a final civil penalty of \$65,000
25 on May 31, 2011. As an incentive for achievement reformulating the Products however, the Final
26 Civil Penalty shall be waived in its entirety if an Officer of Prym certifies in writing that Prym, as of
27 May 1, 2011 has sold, shipped and offered for sale in California only Reformulated Products and that
28 Prym will continue to sell, ship and offer for sale in California only Reformulated Products. Such
certification must be received by The Chanler Group on or before May 15, 2011.

1 Prym shall issue two separate checks the final payment pursuant to Health & Safety Code
2 § 25192: (a) one check made payable to The Chanler Group in Trust for the State of California's
3 Office of Environmental Health Hazard Assessment (OEHHA) in the amount of \$48,750,
4 representing 75% of the total; and (b) one check to The Chanler Group in Trust for Brimer in the
5 amount of \$16,250, representing 25% of the total. Two separate 1099s shall be issued for the above
6 payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN:
7 68-0284486) in the amount of \$48,750. The second 1099 shall be issued in the amount of \$16,250
8 to Brimer, whose address and tax identification number shall be furnished, upon execution of this
9 Agreement. The payments shall be delivered on or before May 31, 2011, to the following address:

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

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

16 **4.1 Attorney Fees and Costs**

17 The parties acknowledge that Brimer and his counsel offered to resolve this dispute without
18 reaching terms on the amount of attorney fees and costs to be reimbursed to them, thereby leaving the
19 fee issue to be resolved after the material terms of the agreement had been settled. Prym then
20 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
21 finalized. The parties then attempted to (and did) reach an accord on the compensation due to Brimer
22 and his counsel under general contract principles and the private attorney general doctrine codified at
23 California Code of Civil Procedure (CCP) § 1021.5, for all work performed through the mutual
24 execution of this agreement. Prym shall reimburse Brimer and his counsel the total of \$54,000 for
25 fees and costs incurred as a result of investigating, bringing this matter to Prym's attention, and
26 litigating and negotiating a settlement in the public interest. Prym shall issue a separate 1099 for fees
27 and costs (EIN: 94-3171522) and shall make the check payable to "The Chanler Group" and shall be
28 delivered within ten (10) days of the Effective Date, to the following address:

The Chanler Group

1 Attn: Proposition 65 Controller
2 2560 Ninth Street
3 Parker Plaza, Suite 214
4 Berkeley, CA 94710-2565

5 **5. RELEASE OF ALL CLAIMS**

6 **5.1 Brimer's Release of Prym**

7 In further consideration of the promises and agreements herein contained, and for the
8 payments to be made pursuant to Sections 3 and 4 above, Brimer, on behalf of himself, his past and
9 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
10 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of
11 legal action and releases all claims, including, without limitation, all actions, and causes of action, in
12 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or
13 expenses (including, but not limited to, investigation fees, expert fees and attorney fees) of any nature
14 whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against Prym
15 and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers,
16 franchisees, dealers, customers (including, but not limited to, Michael's Stores, Inc., and its affiliates
17 and/or subsidiaries), owners, purchasers, users, parent companies, corporate affiliates, subsidiaries,
18 and their respective officers, directors, attorneys, representatives, shareholders, agents, and
19 employees, and sister and parent entities (collectively "Releasees"). This release is limited to those
20 claims that arise under Proposition 65, as such claims relate to Prym's alleged failure to warn about
21 exposures to or identification of lead contained in the Products.

22 Brimer also, on behalf of himself and his agents, attorneys, representatives, successors and
23 assigns, in his individual capacity only and not in his representative capacity, provides a general
24 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
25 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
26 liabilities and demands of Brimer of any nature, character or kind, known or unknown, suspected or
27 unsuspected, and agrees not to initiate, participate in or maintain any further legal action in any
28 judicial or administrative forum, including any Claim, against Prym arising from any alleged
violations of Proposition 65. Brimer acknowledges that he is familiar with Section 1542 of the
California Civil Code, which provides as follows:

1 A general release does not extend to claims which the creditor does not know or
2 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.

3 Brimer, in his individual capacity only and *not* in his representative capacity, on behalf of
4 himself and his agents, attorneys, representatives, successors and assigns, expressly waives and
5 relinquishes any and all rights and benefits that he may have under, or that may be conferred on him
6 by, the provisions of Section 1542 of the California Civil Code as well as under any other state or
7 federal statute or common law principle of similar effect, to the fullest extent that he may lawfully
8 waive such rights or benefits pertaining to the released matters. In furtherance of such intention, the
9 release hereby given shall be and remain in effect as a full and complete release notwithstanding the
10 discovery or existence of any such additional or different claims or facts arising out of the released
11 matters.

12 The Parties further understand and agree that this release shall not extend upstream to any
13 entities that manufactured the Products for Prym or any component parts thereof or to any distributors
14 or suppliers who sold the Products or any component parts thereof to Prym.

15 **5.2 Prym's Release of Brimer**

16 Prym waives any and all claims against Brimer, his attorneys, and other representatives for
17 any and all actions taken or statements made (or those alleged to have been taken or made) by Brimer
18 and his attorneys and other representatives in the course of investigating claims or otherwise seeking
19 enforcement of Proposition 65 against them in this matter with respect to the Products.

20 Prym also provides a general release herein which shall be effective as a full and final accord
21 and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorney fees,
22 damages, losses, claims, liabilities and demands of Prym of any nature, character or kind, known or
23 unknown, suspected or unsuspected, arising out of the subject matter of the Action. Prym
24 acknowledges that it is familiar with Section 1542 of the California Civil Code, which provides as
25 follows:

26 A general release does not extend to claims which the creditor does not know or
27 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.

28

1 Prym expressly waives and relinquishes any and all rights and benefits that it may have under, or that
2 may be conferred on it by, the provisions of Section 1542 of the California Civil Code as well as
3 under any other state or federal statute or common law principle of similar effect, to the fullest extent
4 that it may lawfully waive such rights or benefits pertaining to the released matters. In furtherance of
5 such intention, the release hereby given shall be and remain in effect as a full and complete release
6 notwithstanding the discovery or existence of any such additional or different claims or facts arising
7 out of the released matters.
8

9 **6. COURT APPROVAL**

10 This Consent To Judgment is not effective until it is approved and entered by the Court and
11 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
12 after it has been fully executed by all parties, in which event any monies that have been provided to
13 Brimer, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen
14 (15) days after receiving written notice from Prym that the one-year period has expired.

15 **7. SEVERABILITY**

16 If, subsequent to the execution of this Consent To Judgment, any of the provisions of this
17 Consent To Judgment are held by a court to be unenforceable, the validity of the enforceable
18 provisions remaining shall not be adversely affected.

19 **8. GOVERNING LAW**

20 The terms of this Consent To Judgment shall be governed by the laws of the State of
21 California and apply within the State of California. In the event that Proposition 65 is repealed or is
22 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Prym shall
23 provide written notice to Brimer of any asserted change in the law, and shall have no further
24 obligations pursuant to this Consent To Judgment with respect to, and to the extent that, the Products
25 are so affected.

26 **9. NOTICES**

27 Unless specified herein, all correspondence and notices required to be provided pursuant to
28 this Consent To Judgment shall be in writing and personally delivered or sent by: (i) first-class,

1 registered or certified mail, return receipt requested; or (ii) overnight courier on any party by the other
2 party at the following addresses:

3 For Prym:

4 Johann Starrenburg
5 Prym Consumer USA Inc.
6 P. O. Box 5028
7 Spartanburg, SC 29304

7 with a copy to:

8 Mark K. de Langis
9 Lucas Valley Law
10 2110 Elderberry Lane
11 San Rafael, CA 94903

10 For Brimer:

11 Proposition 65 Coordinator
12 The Chanler Group
13 2560 Ninth Street
14 Parker Plaza, Suite 214
15 Berkeley, CA 94710

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

16 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

20 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

21 Brimer agrees to comply with the reporting form requirements referenced in California Health
22 & Safety Code § 25249.7(f).

23 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

24 The parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a noticed motion
25 is required to obtain judicial approval of this Consent To Judgment. In furtherance of obtaining such
26 approval, Brimer and Prym and their respective counsel agree to mutually employ their best efforts to
27 support the entry of this agreement as a Consent To Judgment and obtain approval of the Consent To
28 Judgment by the Court in a timely manner.

1 **13. MODIFICATION**

2 This Consent To Judgment may be modified only: (1) by written agreement of the parties and
3 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
4 any party and entry of a modified consent judgment by the Court. The Attorney General shall be
5 served with notice of any proposed modification to this Consent To Judgment at least fifteen days in
6 advance of its consideration by the Court.

7 **14. AUTHORIZATION**

8 The undersigned are authorized to execute this Consent To Judgment on behalf of their
9 respective parties and have read, understood, and agree to all of the terms and conditions hereof.

10 **AGREED TO:**

AGREED TO:

11 Date: _____

Date: May 18th 2010

13 By: _____
14 RUSSELL BRIMER

By: Johan Starrenburg
Johan Starrenburg
PRYM CONSUMER USA INC

15 **APPROVED AS TO FORM:**

APPROVED AS TO FORM:

16 Date: _____

Date: _____

17 THE CHANLER GROUP

LUCAS VALLEY LAW

19 By: _____
20 Laurence D. Haveson
21 Attorneys for Plaintiff
22 RUSSELL BRIMER

By: Mark K. de Langis
Mark K. de Langis
Attorneys for Defendant
PRYM CONSUMER USA, INC.

13. MODIFICATION

This Consent To Judgment may be modified only: (1) by written agreement of the parties and upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of any party and entry of a modified consent judgment by the Court. The Attorney General shall be served with notice of any proposed modification to this Consent To Judgment at least fifteen days in advance of its consideration by the Court.

14. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: 5.14.10

Date:

By: [Signature] RUSSELL BRIMER

By: Johan Starrenburg PRYM CONSUMER USA INC.

APPROVED AS TO FORM:
Date: 5/18/2010
THE CHANLER GROUP
By: [Signature] Laurence D. Haveson Attorneys for Plaintiff RUSSELL BRIMER

APPROVED AS TO FORM:
Date:
LUCAS VALLEY LAW
By: [Signature] Mark K. de Langis Attorneys for Defendant PRYM CONSUMER USA, INC.

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