


FEB - 8 2012

CLERK OF THE SUPERIOR COURT
By  Deputy

1 ROBERT L. FALK (BAR NO. 142007)
Email: RFalk@mofa.com
2 WILLIAM F. TARANTINO (BAR NO. 215343)
Email: WTarantino@mofa.com
3 MORRISON & FOERSTER LLP
425 Market Street
4 San Francisco, California 94105-2482
Telephone: 415.268.7000
5 Facsimile: 415.268.7522

6 Attorneys for Defendant
RESTORATION HARDWARE, INC.

7
8 JOSH VOORHEES, State Bar No. 241436
TROY C. BAILEY, State Bar No. 277424
9 THE CHANLER GROUP
2560 Ninth Street
10 Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: 510.848.8880
11 Facsimile: 510.848.8118

12 Attorneys for Plaintiff
RUSSELL BRIMER

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF ALAMEDA

17 RUSSELL BRIMER,
18 Plaintiff,
19 v.
20 RESTORATION HARDWARE, INC., *et al.*,
21 Defendants.

Case No. RG-11591608
UNLIMITED JURISDICTION
**[PROPOSED] JUDGMENT
PURSUANT TO TERMS OF
CONSENT JUDGMENT**
Date: January 4, 2012
Time: 2:30 p.m.
Dept: 522
Judge: Hon. Richard Keller
Complaint Filed: August 22 , 2011

1 In the above-entitled action, Plaintiff RUSSELL BRIMER and Defendant
2 RESTORATION HARDWARE, INC. have agreed through their respective counsel that
3 judgment be entered pursuant to the terms of the [Proposed] Consent Judgment entered into by
4 the parties on August 23, 2011.

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Code of
6 Civil Procedure section 664.6, judgment is entered in accordance with the terms of the [Proposed]
7 Order Approving the Consent Judgment.

8 **IT IS SO ORDERED.**

9
10 Dated: FEB - 8 2012

DENNIS HAYASHI

Judge of the Alameda County Superior Court

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit 1

1 Josh Voorhees, State Bar No. 241436
2 Troy C. Bailey, State Bar No. 277424
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 RUSSELL BRIMER

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA

13 RUSSELL BRIMER,

14 Plaintiff,

15 v.

16 RESTORATION HARDWARE, INC., *et al.*,

17 Defendants.

Case No. RG-11591608

UNLIMITED JURISDICTION

[PROPOSED] CONSENT JUDGMENT

Dept:
Judge:
Date:

Complaint Filed: August 22 , 2011

1 **I. INTRODUCTION**

2 **A. The Parties.**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer on behalf
4 of the public interest (“Brimer”) and Restoration Hardware, Inc. (“RH” or the “Settling
5 Defendant”), with Brimer and RH collectively referred to as the “Parties.” Brimer is an
6 individual residing in the State of California who seeks to promote awareness of exposure to
7 toxic chemicals and improve human health by reducing or eliminating hazardous substances
8 contained in consumer and commercial products. RH employs ten or more persons and is a
9 person in the course of doing business for purposes of the Safe Drinking Water and Toxic
10 Enforcement Act of 1986, California Health & Safety Code § 25249.6, *et seq.* (“Proposition
11 65”).

12 **B. General Allegations**

13 Brimer has alleged that RH has manufactured, imported, distributed and/or offered
14 for sale in California tape measures which contain lead. Lead is listed under Proposition 65
15 as a chemical known to the State of California to cause birth defects and other reproductive
16 harm. Brimer has also investigated other consumer products sold by RH in California
17 including, but not limited to, decorative mugs appearing to contain lead, as well as welder’s
18 goggles, luggage tags, and a golf rangefinder, which have raised concerns by Brimer
19 regarding the potential need for Proposition 65 warnings for lead and/or di(2-
20 ethylhexyl)phthalate (“DEHP”), butyl benzyl phthalate (“BBP”), and/or Di-n-butyl
21 phthalate (“DBP”). (DEHP, BBP and DBP are also listed under Proposition 65 and,
22 together with lead and lead compounds, are referred to herein as the “Listed Chemicals.”)

23 **C. Covered Products**

24 The products that are covered by this Consent Judgment are defined as follows: (a) tape
25 measures containing lead, manufactured, distributed, sold, and/or offered for sale by RH in
26 California, referred to hereinafter as the “Products” and, (b) welder’s goggles, luggage tags, golf
27 rangefinders and decorative mugs manufactured, distributed, sold and/or offered for sale by RH
28

1 in California that contain one or more of the Listed Chemicals (collectively, the latter are
2 referred to herein as, the “Additional Products”).

3 **D. Notice of Violation**

4 On or about February 1, 2011, Brimer served RH and various public enforcement
5 agencies with a document entitled “60-Day Notice of Violation,” along with the requisite
6 Certificate of Merit, that provided RH and public enforcers with notice of alleged violations of
7 Proposition 65 for failing to warn consumers that the Products that RH sold in California
8 exposed users to lead (the “Notice”). Although more than 60-days, plus service time, has passed
9 from the date of the Notice, no public or other enforcer of Proposition 65 has diligently
10 prosecuted the allegations set forth in the Notice or initiated a Proposition 65 enforcement action
11 concerning any Additional Product.

12 **E. Complaint**

13 On August 22, 2011, Brimer filed a complaint in the Superior Court in and for the County
14 of Alameda against RH and Does 1 through 150, *Brimer v. Restoration Hardware, Inc., et al.*
15 No. RG-11591608 (the “Action”), alleging violations of California Health & Safety Code
16 § 25249.6, based on the alleged exposures to lead contained in the Products (i.e., tape measures)
17 RH sold.

18 **F. No Admission**

19 RH denies the material, factual and legal allegations contained in Brimer’s Notice and
20 Complaint and maintain that all Products and Additional Products it has sold and distributed in
21 California have been and are in compliance with all laws. Nothing in this Consent Judgment
22 shall be construed as an admission by RH of any fact, finding, issue of law, or violation of law,
23 nor shall compliance with this Consent Judgment constitute or be construed as an admission by
24 RH of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
25 denied by RH. However, this section shall not diminish or otherwise affect RH’s obligations,
26 responsibilities, and duties under this Consent Judgment.

1 **G. Consent to Jurisdiction**

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

6 **H. Effective Date**

7 For purposes of this Consent Judgment, the term “Effective Date” shall mean
8 December 31, 2011.

9 **II. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

10 **A. Reformulation as to the Products**

11 As of the date of the Notice, RH has not, and, going forward, RH shall not, accept from a
12 manufacturer or other supplier, Products to be offered for sale in California that are not “Lead
13 Free.” For purposes of this Consent Judgment, “Lead Free” shall mean Products that contain
14 less than 300 parts per million (“ppm”) of lead or lead compounds in components that are
15 reasonably likely to be handled, touched or mouthed during ordinary use or handling, and which
16 components yield less than 300 parts per million (“ppm”) lead when analyzed pursuant to EPA
17 testing methodologies 3050B and 6010B, or equivalent methodologies utilized by federal or state
18 agencies for the purpose of determining lead content in a solid substance. As of the Effective
19 Date, however, the meaning of “Lead Free” shall change as to the Products, reducing the ppm
20 limit in Products from 300 ppm to 100 ppm.¹ In addition, as of the Effective Date, RH shall
21 require that the Products contain less than or equal to 1,000 ppm of each of DEHP, BBP, and
22 DBP, when analyzed pursuant to EPA testing methodologies 3580A and 8270C or any testing
23 methodology selected by RH that is acceptable to state or federal government agencies in

24 _____
25 ¹ For decorative mugs only, compliance with the “Lead Free” standard may alternatively
26 be demonstrated by RH by showing that the mug achieves a result of 0.99 ppm or less for lead
27 after correction for internal volume when tested under the ASTM C927-2004 test method,
28 modified for total immersion with results corrected for internal volume (i.e., the sample mug shall
be fully immersed in 4% acetic acid in a graduated cylinder that is large enough to accommodate
submersion of the entire mug in the solution).

1 determining compliance with phthalate standards. (Meeting the 1,000 ppm standard for each of
2 DEHP, BBP, and DBP is hereinafter referred to as being “Phthalate Free.”)

3 **B. Obligations as to Additional Products**

4 As of the Effective Date, RH shall only accept from a manufacturer or other supplier,
5 Additional Products to be offered for sale in California: (1) that are both “Lead Free” and
6 “Phthalate Free” as defined in Section II.A above, or, alternatively (2) which carry a clear and
7 reasonable Proposition 65 warning pursuant to Section II.C below. Any warning issued for
8 Additional Products pursuant to this Consent Judgment, shall be prominently placed with such
9 conspicuousness as compared with other words, statements, designs or devices as to render it
10 likely to be read and understood by an ordinary individual under customary conditions before
11 purchase or, for Additional Products shipped directly to an individual in California, before use.

12 **C. Warnings**

13 To the extent that RH’s obligations under Section II.B are not met for an Additional
14 Product through timely reformulation to levels that are both Lead Free and Phthalate Free, RH
15 shall address its warning obligation under Section II.B above by affixing a warning to the
16 packaging of, or, if no packaging exists, directly on, each Additional Product sold in California
17 that states:

18 **WARNING:** This product contains lead and one or more
19 phthalates, chemicals known to the State of
20 California to cause birth defects and other
reproductive harm.²

21 For Additional Products sold by catalog or via the internet or by telephone, the preceding
22 warning statement must be supplemented with written information advising the consumer, in a
23 conspicuous manner, that he or she may return the Additional Product for a full refund (including

24 ² The words “lead and” may be deleted from the above and from any of the warning statements
25 that follow below for Additional Products where RH has obtained information indicating that such
26 Additional Products contain lead at levels below the Lead Free level defined in Section II.A above.
27 Conversely, the words “and one or more phthalates” may be deleted from the above and from any of the
28 warning statements that follow below for Additional Products where RH has obtained information
indicating that such Additional Products contain phthalates at levels below the Phthalate Free level defined
in Section II.A above. (In the latter circumstance, the plural “chemicals” may be changed to the singular
“a chemical” as well.)

1 shipping costs for both the receipt and the return of the product) within fifteen (15) days of his or
2 her receipt of the Additional Product.

3 **D. Warning Exceptions**

4 The warning requirements set forth in Section II.C shall not apply to:

- 5 (i) Additional Products received by RH before the Effective
6 Date; or
7 (ii) Additional Products which are both Lead Free and Phthalate
Free (as defined in Section II.A).

8 **III. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

9 **A. Initial Civil Penalty**

10 In settlement of all the claims referred to in this Consent Judgment, RH shall pay an
11 initial civil penalty of \$10,000, to be apportioned in accordance with California Health & Safety
12 Code § 25192, with 75% of these funds remitted to the State of California's Office of
13 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty
14 remitted to Russell Brimer, as provided by California Health & Safety Code § 25249.12(d). Said
15 initial civil penalty has been reduced by \$30,000 due to RH's commitment, in furtherance of the
16 public interest, to reformulate the Products at issue.

17 RH shall issue two separate checks for the penalty payment: (a) one check made payable
18 to "The Chanler Group in Trust For OEHHA" in an amount representing 75% of the total
19 penalty; and (b) one check to "The Chanler Group in Trust for Russell Brimer" in an amount
20 representing 25% of the total penalty. Two separate 1099s shall be issued for the above
21 payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b)
22 Russell Brimer, whose information shall be provided by email or other means within ten
23 calendar days of RH's execution and delivery of this Consent Judgment document to Brimer's
24 counsel.

25 Payment shall be delivered to Brimer's counsel on or before October 1, 2011, at the
26 following address:

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

6 **B. Additional Civil Penalty**

7 RH shall pay an additional civil penalty of \$20,000 on July 31, 2012. As an incentive for
8 reformulating the Additional Products, however, this additional civil penalty shall be waived in
9 its entirety if RH certifies in writing that, as of July 31, 2012, it will only accept from a
10 manufacturer or other supplier for sale in California, Additional Products which are Lead Free
11 and Phthalate Free. Such certification must be received by The Chanler Group on or before
12 July 15, 2012.

13 **C. Payment Allocation**

14 Additional civil penalty payments required pursuant to Section III. B shall be apportioned
15 in accordance with California Health & Safety Code §25192, with 75% of these funds remitted
16 to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") and
17 the remaining 25% of the penalty remitted to Russell Brimer, as provided by California Health &
18 Safety Code § 25249.12(d). RH shall issue two separate checks for the final civil penalty
19 payment: (a) one check made payable to "The Chanler Group in Trust For OEHHA" in an
20 amount representing 75% of the total penalty; and (b) one check to "The Chanler Group in Trust
21 for Russell Brimer" in an amount representing 25% of the total penalty. Two separate 1099s
22 shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814
23 (EIN: 68-0284486); and (b) Russell Brimer, whose information shall be provided by email or
24 other means at least thirty (30) calendar days before the payment is due.

25 Payment shall be delivered to Brimer's counsel at the following address:

26 The Chanler Group
27 Attn: Proposition 65 Controller
28 2560 Ninth Street
 Parker Plaza, Suite 214
 Berkeley, CA 94710

1 **IV. REIMBURSEMENT OF FEES AND COSTS**

2 The Parties reached an accord on the compensation due to Brimer and his counsel under
3 the private attorney general doctrine codified at California Code of Civil Procedure (“CCP”) §
4 1021.5 and principles of contract law. Under these legal principles, RH shall reimburse Brimer
5 and his counsel for a portion of its fees and costs incurred as a result of investigating, bringing
6 this matter to its attention, and negotiating a settlement and consent judgment in the public
7 interest. RH shall pay Brimer and his counsel \$50,000 for all attorneys’ fees, expert and
8 investigation fees, and related costs in association with this matter, including with respect to the
9 Products and the Additional Products. This figure includes Brimer’s future fees and costs
10 including attorney’s fees to be incurred in seeking judicial approval of this Consent Judgment as
11 well as any other legal work performed after the execution of this Consent Judgment incurred in
12 an effort to obtain finality of the case. In the event a third party were to appeal entry of this
13 Consent Judgment, however, Plaintiff and his counsel shall be entitled to seek their reasonable
14 attorney’s fees and costs associated with all appellate work defending the entry of judgment
15 pursuant to CCP § 1021.5.

16 The payment shall be issued in a separate check made payable to “The Chanler Group”
17 and shall be delivered on or before October 1, 2011, to the following address:

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

21 RH shall also issue a separate 1099 for attorney’s fees and costs paid under this
22 paragraph to The Chanler Group, 2560 Ninth Street, Parker Plaza, Suite 214, Berkeley,
23 California 94710 (EIN: 94-3171522).

1 **V. RELEASE OF ALL CLAIMS**

2 **A. Full, Final and Binding Resolution of Proposition 65 Allegations as to**
3 **the Products Identified in the Notice**

4 This Consent Judgment is a full, final and binding resolution between Plaintiff, on behalf
5 of himself and the public interest, and RH, of any violation of Proposition 65 that was or could
6 have been asserted by Plaintiff against RH, its parents, subsidiaries, affiliated entities that are
7 under common ownership, directors, officers, employees, attorneys, and each entity to whom RH
8 directly or indirectly distributes or sells Products, including but not limited to downstream
9 distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and
10 licensees, based on their failure to warn about alleged exposures to lead contained in the
11 Products. The Parties further understand and agree that this release shall also extend to Li &
12 Fung, Ltd. and other members of the Li & Fung Group, based on their failure to warn about
13 alleged exposures to lead contained in the Products. The aforementioned individuals and entities
14 discussed in Section V.A shall hereinafter be collectively known as (“Releasees”).

15 **B. Brimer’s Individual Release of Proposition 65 Claims**

16 Plaintiff also, in his individual capacity only and not in his representative capacity,
17 provides a release herein which shall be effective as a full and final accord and satisfaction, as a
18 bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses,
19 claims, liabilities and demands of plaintiff of any nature, character or kind, whether known or
20 unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to
21 lead in the Products, as well as to lead and/or DEHP, BBP, and DBP contained in the Additional
22 Products, manufactured, distributed, sold, and/or offered for sale by RH.

23 **C. Restoration Hardware, Inc.’s Release of Brimer**

24 RH, on behalf of itself and its Releasees, and their past and current agents,
25 representatives, attorneys, successors, and/or assignees, hereby waive any and all claims against
26 Brimer, his attorneys, and other representatives for any and all actions taken or statements made
27 (or those that could have been taken or made) by Brimer and his attorneys and other
28 representatives, whether in the course of investigating claims or otherwise seeking enforcement

1 of Proposition 65 against them in this matter, and/or with respect to the Listed Chemicals in the
2 Products or Additional Products.

3 **VI. SEVERABILITY**

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

7 **VII. GOVERNING LAW**

8 The terms of this agreement and Consent Judgment shall be governed by the laws of the
9 State of California and apply within the State of California.

10 **VIII. NOTICES**

11 Unless specified herein, all correspondence and notices required to be provided pursuant
12 to this settlement agreement shall be in writing and personally delivered or sent by: (i) first-
13 class, registered or certified mail, return receipt requested; or (ii) overnight courier on any party
14 by the other party at the following addresses:

15 To Restoration Hardware, Inc.:

16 Fran Hamman
17 Restoration Hardware, Inc.
18 15 Koch Road, Suite J
19 Corte Madera, CA 94925

20 With a copy to

21 Gavin B. Grover, Esq.
22 Morrison & Foerster LLP
23 425 Market Street, 32nd Floor
24 San Francisco, CA 94105

25 To Russell Brimer:

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

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

1 **IX. COUNTERPARTS; FACSIMILE SIGNATURES**

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

6 **X. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

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

9 **XI. MODIFICATION AND ATTORNEY'S FEES**

10 **A. Modification**

11 This Consent Judgment may be modified only by stipulation of the Parties and an order
12 of the Court or upon a motion by any Party that is granted by the Court.

13 **B. Attorney's Fees**

14 1. Should Brimer prevail on any motion, application for an order to show
15 cause, or other proceeding to enforce a violation of this Consent Judgment, Brimer shall be
16 entitled to his reasonable attorney's fees and costs incurred as a result of such motion or
17 application, consistent with CCP § 1021.5. Should RH prevail on any motion or application for
18 an order to show cause or other proceeding, it may be awarded its reasonable attorney's fees and
19 costs as a result of such motion or application upon a finding by the Court that Brimer's
20 prosecution of the motion or application lacked substantial justification. For purposes of this
21 Consent Judgment, the term substantial justification shall carry the same meaning as used in
22 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, *et seq.*

23 2. Except as specifically provided in Section IV and XI.B1. above and XII
24 below, each Party shall bear its own costs and attorney's fees in connection with this action.
25 Nothing in this Section XI shall preclude a Party from seeking an award of sanctions pursuant to
26 law.

1 **XII. ADDITIONAL POST-EXECUTION ACTIVITIES**

2 The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a noticed
3 motion is required to obtain judicial approval of this Consent Judgment. In furtherance of
4 obtaining such approval, RH's counsel shall prepare the first draft of a motion and
5 accompanying memorandum of points and authorities ("MPA") for this Consent Judgment's
6 approval by the Court and shall deliver said draft motion and MPA to Brimer's counsel on or
7 before October 31, 2011. Brimer's counsel shall provide such supporting documents, including a
8 declaration as to the reasonableness of their attorneys' fees, as are necessary to support such
9 motion and MPA. Brimer and RH, and their respective counsel, agree to mutually employ their
10 best efforts to support the entry of this agreement as a Consent Judgment and obtain approval of
11 the Consent Judgment by the Court in a timely manner. If the Consent Judgment is approved by
12 the Court but challenged in the Court of Appeal by a third party, Plaintiff shall retain its right to
13 pursue recovery of attorneys fees for its further efforts at the appellate level pursuant to CCP §
14 1021.5.

15 **XIII. ENTIRE AGREEMENT**

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


22 /////
23 /////
24 /////
25 /////
26 /////
27 /////
28

1 **XIV. 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.

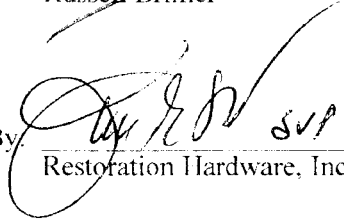
5
6 AGREED TO:

7 Dated: 8-23-11

By: 
Russell Brimer

8
9 AGREED TO:

10 Dated: AUGUST 23, 2011

By:  SVP
Restoration Hardware, Inc.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28