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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 IN AND FOR THE COUNTY OF MARIN

9 UNLIMITED CIVIL JURISDICTION

10
11 RUSSELL BRIMER,

12 Plaintiff,

13 v.

14 SA&E INTERNATIONAL BAGS &
15 ACCESSORIES LLC, TUESDAY MORNING
CORPORATION, BURLINGTON COAT
16 FACTORY WAREHOUSE CORPORATION
and DOES 1-600,

17 Defendants.

Case No. CIV1006338

CONSENT TO JUDGMENT

Trial Date: Not Yet Assigned
Action Filed: March 16, 2011

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”), Defendant SA&E International Bags & Accessories, LLC dba Rugged
5 Equipment (“SA&E”), Defendant Tuesday Morning Corporation (“Tuesday Morning”) and
6 Defendant Burlington Coat Factory Warehouse Corporation (“Burlington”), with Tuesday
7 Morning, Burlington and SA&E collectively referred to as “Defendants” and with Brimer,
8 Tuesday Morning, Burlington and SA&E collectively referred to as the “Parties”

9 **1.2 Plaintiff**

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

13 **1.3 Defendants**

14 SA&E, Burlington and Tuesday Morning each employ 10 or more persons and is a person
15 in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement
16 Act of 1986, California Health & Safety Code §§ 25249.6 *et seq.* (“Proposition 65”).

17 **1.4 General Allegations**

18 Brimer alleges that SA&E has manufactured, imported, distributed and/or sold
19 handbags containing lead and DEHP in external components for use in the State of California
20 without the requisite health hazard warnings. Brimer further alleges that defendants Burlington
21 and Tuesday Morning have each distributed and/or sold handbags containing lead and DEHP
22 in external components for use in the State of California without the requisite health hazard
23 warnings. Both DEHP and lead are listed pursuant to Proposition 65 as chemicals known to the
24 State of California to cause birth defects and other reproductive harm and are collectively
25 referred to hereinafter as the “Listed Chemicals.”

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1 **1.5 Notice of Violation**

2 On February 12, 2010, Brimer served SA&E and various public enforcement agencies
3 with a document entitled “60-Day Notice of Violation” (“Notice”) that provided public
4 enforcers and these entities with notice of alleged violations of Health & Safety Code § 25249.6
5 for failing to warn consumers of the presence of lead, a toxic chemical found in their handbags
6 including, but not limited to, Work Essentials by Totes, (Item #7 68410 21890 2).

7 On February 24, 2011, Brimer served SA&E, Burlington, Tuesday Morning and various
8 public enforcement agencies with a document entitled “60-Day Notice of Violation” (“Notice”)
9 that provided public enforcers and these entities with notice of alleged violations of Health &
10 Safety Code § 25249.6 for failing to warn consumers of the presence of lead and Di(2-
11 ethylhexyl)phthalate (“DEHP”), toxic chemicals found in handbags manufactured, distributed
12 and sold by them including, but not limited to, Work Essentials by Totes (Style #TH2189, Item
13 #7 68410 21890 2), Totes American Classic Tote Bag (Style #TH2346, Item #7 68410 24360 7) and
14 Totes 15” Carry-On Bag (Style #TL339, Item #7 68410 33391 9).

15 To the best of the Parties’ knowledge, no public enforcer has commenced and is
16 diligently prosecuting the allegations set forth in the Notice.

17 **1.6 Complaint and First Amended Complaint**

18 On December 2, 2010, Brimer, acting, in the interest of the general public in California,
19 filed a Complaint in the Superior Court in and for the County of Marin, alleging violations by
20 SA&E of Health & Safety Code § 25249.6 based, *inter alia*, on the alleged exposures to lead
21 contained in the handbags including, but not limited to, Work Essentials by Totes, (Item #7 68410
22 21890 2)

23 On May 5, 2011, Brimer, acting in the further interest of the general public in California,
24 filed a First Amended Complaint in the Superior Court in and for the City and County of Marin,
25 alleging violations by Defendants of Health & Safety Code § 25249.6 based, *inter alia*, on the
26 alleged exposures to lead and DEHP contained in the handbags including, but not limited to,
27 Work Essentials by Totes (Style #TH2189, Item #7 68410 21890 2), Totes American Classic Tote

1 Bag (Style #TH2346, Item #7 68410 24360 7) and Totes 15" Carry-On Bag (Style #TL339, Item #7
2 68410 33391 9) (the "Action").

3 **1.7 No Admission**

4 This Consent To Judgment resolves claims that are denied and disputed by Defendants.
5 The Parties enter into this Consent To Judgment pursuant to a full and final settlement of any
6 and all claims between the Parties for the purpose of avoiding prolonged litigation. Defendants
7 deny the material factual and legal allegations contained in the Notice and Action, maintain that
8 they did not knowingly or intentionally expose California consumers to lead and other chemicals
9 through the reasonably foreseeable use of the Covered Products and otherwise contend that all
10 Covered Products that have been manufactured, distributed and/or sold in California have been
11 and are in compliance with all applicable laws. Nothing in this Consent To Judgment shall be
12 construed as an admission by Defendants of any fact, finding, issue of law, or violation of law;
13 nor shall compliance with this Consent To Judgment constitute or be construed as an admission
14 by Defendants of any fact, finding, conclusion, issue of law, or violation of law, such being
15 specifically denied by Defendants. However, notwithstanding the foregoing, this section shall
16 not diminish or otherwise affect Defendants' obligations, responsibilities, and duties under this
17 Consent To Judgment.

18 **1.8 Consent to Jurisdiction**

19 For purposes of this Consent To Judgment only, the Parties stipulate that this Court has
20 jurisdiction over Defendants as to the allegations contained in the Complaint, that venue is
21 proper in Marin County, and that this Court has jurisdiction to enter and enforce the provisions
22 of this Consent To Judgment. As an express part of this Agreement, pursuant to C.C.P. §664.6
23 the Court in which this action was filed shall retain jurisdiction over the parties to enforce the
24 settlement until performance in full of the terms of the settlement.

25 **1.9 Retailer Confirmation of No Inventory**

26 As of the Effective Date, Burlington and Tuesday Morning each represent that they have
27 conducted a competent search of inventory of the Covered Products at their California retail

1 locations. Burlington and Tuesday Morning hereby confirm that either none of their respective
2 California retail stores had any remaining inventory of the Covered Products as of the Effective
3 Date or that any such identified inventory has been destroyed or returned to SA&E and that
4 none of their respective California retail stores had any remaining inventory of the Covered
5 Products as of the date of their signature hereafter.

6 **2. DEFINITIONS**

7 2.1 The term "Complaint" shall mean, collectively, the December 2, 2010 Complaint
8 and the May 5, 2011, First Amended Complaint.

9 2.2 The term "Covered Products" means any Work Essentials by Totes product
10 (including Style #TH2189, Item #7 68410 21890 2), Totes American Classic Tote Bag product
11 (including Style #TH2346, Item #7 68410 24360 7) and Totes 15" Carry-On Bag product
12 (including Style #TL339, Item #7 68410 33391 9), manufactured with materials containing lead
13 and/or DEHP.

14 2.3 The term "Effective Date" shall mean November 1, 2011.

15 2.4 The term "DEHP Free" Covered Products shall mean Covered Products
16 containing materials or other components that may be handled, touched or mouthed by a
17 consumer, and which components yield less than or equal to 1,000 parts per million ("ppm") of
18 DEHP as determined by a minimum of duplicate quality controlled test results using
19 Environmental Protection Agency ("EPA") testing methodologies 3580A and 8270C.

20 2.5 The term "Lead Free" Covered Products shall mean Covered Products containing
21 materials or other components that may be handled, touched or mouthed by a consumer, and
22 which components yield less than 1.0 microgram of lead when using a wipe test pursuant to
23 NIOSH Test Method 9100, and yield less than 300 parts per million ("ppm") lead when analyzed
24 pursuant to EPA testing methodologies 3050B and 6010B, or equivalent methodologies utilized
25 by federal or state agencies for the purpose of determining lead content in a solid substance.

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1 **3. INJUNCTIVE RELIEF**

2 **3.1 Formulation Commitment**

3 **3.1.1** As of the Effective Date, SA&E shall not order, cause to be ordered, manufacture
4 or cause to be manufactured any Covered Product for distribution to or sale in California that is
5 not both Lead Free and DEHP Free.

6 As of the Effective Date, SA&E shall also not shall not sell, ship, offer to be distributed,
7 sold or shipped, or cause to be distributed, sold or shipped to or in California, any Covered
8 Product that is not both Lead Free and DEHP Free, unless a clear and reasonable warning is
9 attached to each such Covered Product as described under Section 3.2.2.

10 As of the Effective Date, SA&E shall also not sell, ship or distribute to any entity or
11 retailer having retail store locations in California any Covered Products unless such Covered
12 Products are both Lead Free and DEHP Free, unless a clear and reasonable warning is attached
13 to each such Covered Product as described under Section 3.2.2.

14 **3.1.2** For every Covered Product ordered, caused to be ordered, manufactured or
15 caused to be manufactured for distribution to or sale in California after the Effective Date, and
16 for every Covered Product distributed, caused to be distributed, sold or caused to be sold in
17 California by SA&E, it shall maintain copies of all testing of such products and any other
18 documentation allegedly demonstrating compliance with this section.

19 **3.2 Notification and Warnings**

20 **3.2.1 Customer Notification**

21 Within twenty (20) days of the Effective Date, SA&E shall issue an express, written letter
22 (electronic or otherwise) notice to (1) each California retail store or establishment to which it sold
23 or supplied any Covered Products within one year prior to the Effective Date, (2) any California
24 store or establishment from which SA&E sold any Covered Products and (3) any other store or
25 establishment that SA&E is reasonably aware of having sold any Covered Product in California
26 within one year prior to the Effective Date [this is meant only for stores/establishments, not
27 individual consumer users], that identifies the Covered Product (by brand and trade name, SKU,

1 ISB or any other identifying name and number utilized by defendant in the distribution or sale of
2 the Covered Product), and advises the recipient store or establishment that each such identified
3 Covered Product “contains LEAD and DEHP, chemicals known to the State of California to
4 cause birth defects and other reproductive harm”, and, provided any such Covered Products
5 remain in possession of these said retailers, requests such recipient to either label the Covered
6 Product with the product label identified in Section 3.2.2(a)(i) or to return the Covered Product
7 to SA&E at that defendant’s sole expense.

8 SA&E shall maintain records of all compliance correspondence or other communication
9 generated pursuant to this Section for two (2) years from the Effective Date and shall produce
10 copies of such records within a reasonable time following receipt of written request by Brimer.

11 **3.2.2 Product Warnings**

12 Commencing on the Effective Date, any Covered Product requiring a warning under
13 Section 3.1.1 shall be sold or shipped by SA&E with one of the clear and reasonable warnings set
14 forth hereafter.

15 Each warning shall be prominently placed on or attached to the Covered Product with
16 such conspicuousness as compared with other words, statements, designs, or devices as to
17 render it likely to be read and understood by an ordinary individual under customary conditions
18 *before* purchase or use. Each warning shall be provided in a manner such that the consumer or
19 user understands to which *specific* Covered Product the warning applies, so as to minimize the
20 risk of consumer confusion.

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

22 (i) **Product Labeling.** SA&E may affix a warning to the packaging,
23 labeling, or directly on any Covered Products sold or intended for sale at a retail outlet in
24 California that states:

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

1 (ii) **Point-of-Sale Warnings.** Alternatively, SA&E may provide
2 warning signs in the form below for any retail outlets selling the Covered Products in
3 California, or to such stores in California they are reasonably aware now have inventory or
4 orders of the Covered Products, with instructions to post the signs *in immediate proximity* to the
5 point of display of any and all such Covered Products for the benefit of its customers.

6 **WARNING:** This product contains LEAD and DEHP,
7 chemicals known to the State of California to
8 cause birth defects and other reproductive
harm.

9 (b) **Mail Order Catalog and Internet Sales.** In the event that SA&E, sells any
10 Covered Products via mail order catalog or the Internet to customers located in California any
11 such catalog or Internet site offering any Covered Product for sale shall include a warning in the
12 catalog or within the website, identifying the specific Covered Product to which the warning
13 applies, as specified in Sections 3.2.2(b)(i) and (ii).

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

18 **WARNING:** This product contains LEAD and DEHP,
19 chemicals known to the State of California to
20 cause birth defects and other reproductive
harm.

21 Where it is impracticable to provide the warning on the same page and in the same
22 location as the display and/or description of the Covered Product, SA&E may utilize a
23 designated symbol to cross reference the applicable warning and shall define the term
24 "designated symbol" with the following language on the inside of the front or back cover of the
25 catalog or on the same page as any order form for the Covered Product(s):

26 **WARNING:** Certain products identified with this
27 symbol ▼ and offered for sale in this
catalog contain LEAD and DEHP,
chemicals known to the State of California

1 to cause birth defects and other
2 reproductive harm.

3 The designated symbol must appear on the same page and in close proximity to the
4 display and/or description of the Covered Product. On each page where the designated symbol
5 appears, Defendants must provide a header or footer directing the consumer to the warning
6 language and definition of the designated symbol.

7 If SA&E elects to provide warnings in any mail order catalog, then the warnings must be
8 included in all catalogs offering to sell one or more Covered Products printed after the Effective
9 Date.

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

18 **WARNING:** This product contains LEAD and DEHP,
19 chemicals known to the State of California to
20 cause birth defects and other reproductive
21 harm.

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

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

1 **3.2.3** SA&E, shall maintain records of all compliance correspondence, inventory reports
2 or other communication generated pursuant to Section 3.2.2 for three (3) years from the Effective
3 Date and shall produce copies of such records upon reasonable notice following written request
4 by Brimer.

5 **4. MONETARY PAYMENTS**

6 **4.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

7 SA&E shall make a payment of \$15,000.00 to be apportioned in accordance with Health
8 & Safety Code section 25249.12, subdivisions (c)(1) and (d), with 75% of these funds earmarked
9 for the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”)
10 and the remaining 25% of these penalty monies earmarked for Brimer.

11 **4.2 Augmentation of Penalty Payments**

12 For purposes of the penalty assessment under this Consent To Judgment, plaintiff is
13 relying entirely upon SA&E and its counsel for accurate, good faith reporting to plaintiff of the
14 nature and amounts of relevant sales activity. If within twelve (12) months of the Effective Date,
15 plaintiff discovers and presents to SA&E evidence that the Covered Products have been
16 distributed by SA&E, or sold by Tuesday Morning or Burlington, in sales volumes materially
17 different than those identified by Defendants prior to execution of this Agreement, then Plaintiff
18 shall provide SA&E with notice of any such alleged material inaccuracy for the purpose of
19 providing the applicable defendant with an opportunity to respond and, if appropriate, cure any
20 such violation of the representation of accuracy made herein. Failing same, SA&E shall be liable
21 for an additional penalty not to exceed \$5,000.00 for Covered Product sold prior to execution of
22 this Agreement but not identified by SA&E to plaintiff. In such instance of misreporting, SA&E
23 shall also be liable for any reasonable, additional attorney fees expended by plaintiff in
24 discovering such additional retailers or sales. Plaintiff agrees to provide SA&E with a written
25 demand for all such additional penalties and attorney fees under this Section. After service of
26 such demand, SA&E shall have thirty (30) days to agree to the amount fees and penalties owing
27 by SA&E and submit such payment to plaintiff in accordance with the method of payment of

1 penalties and fees identified in this Sections 4. Should this thirty (30) day period pass without
2 any such resolution between the parties and payment of such additional penalties and fees,
3 plaintiff shall be entitled to file a formal legal claim for damages for breach of this contract and
4 shall be entitled to all reasonable attorney fees and costs relating to such claim as the court may
5 award.

6 **4.3 Reimbursement of Plaintiff's Fees and Costs**

7 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
8 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
9 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
10 SA&E then expressed a desire to resolve the fee and cost issue shortly after the other settlement
11 terms had been finalized. The Parties then attempted to (and did) reach an accord on the
12 compensation due to Brimer and his counsel under general contract principles and the private
13 attorney general doctrine codified at California Code of Civil Procedure section 1021.5, for all
14 work performed in this matter, except fees that may be incurred on appeal. Under these legal
15 principles, SA&E shall pay the amount of \$63,000.00 for fees and costs incurred investigating,
16 litigating and enforcing this matter, including the fees and costs incurred (and yet to be
17 incurred) negotiating, drafting, and obtaining the Court's approval of this Consent Judgment in
18 the public interest.

19 **4.4 Payment Procedures**

20 **4.4.1 Funds Held In Trust:** All payments required by Sections 4.1 and 4.3 shall
21 delivered to either The Chanler Group or the attorney of record for the SA&E, and shall be held
22 in trust pending the Court's approval of this Consent Judgment.

23 Payments delivered to The Chanler Group shall be made payable, as follows:

- 24 (a) One check, delivered on or before December 16, 2011, made
25 payable to "The Chanler Group in Trust for OEHHA" in the
26 amount of \$11,250.00 (or 75% of any net penalty after reduction
27 pursuant to Section 4.2);

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- (b) One check, delivered on or before December 16, 2011, made payable to "The Chanler Group in Trust for Brimer" in the amount of \$3,750.00 (or 25% of any net penalty after reduction pursuant to Section 4.2); and
- (c) One check, delivered on or before December 16, 2011, made payable to "The Chanler Group in Trust" in the amount of \$43,000.00.
- (d) One check, delivered on or before January 13, 2012, made payable to "The Chanler Group in Trust" in the amount of \$20,000.00.

Payments delivered to counsel for SA&E shall be made payable, as follows:

- (a) One check, delivered on or before December 16, 2011, made payable to "Buchalter Nemer PLC in Trust for OEHHA" in the amount of \$11,250.00 (or 75% of any net penalty after reduction pursuant to Section 4.2);
- (b) One check, delivered on or before December 16, 2011, made payable to "Buchalter Nemer PLC in Trust for Brimer" in the amount of \$3,750.00 (or 25% of any net penalty after reduction pursuant to Section 4.2); and
- (c) One check, delivered on or before December 16, 2011, made payable to "Buchalter Nemer PLC in Trust" in the amount of \$43,000.00.
- (d) One check, delivered on or before January 13, 2012, made payable to "Buchalter Nemer PLC in Trust" in the amount of \$20,000.00.

If SA&E elects to deliver payments to its attorney of record, the attorney of record shall confirm, in writing within five days of deposit, that the funds have been deposited in a trust

1 account.

2 Within two days of the date of the hearing on which the Court approves the Consent
3 Judgment, the payments being held in trust by the attorney of record for the SA&E shall be
4 delivered to The Chanler Group in three separate checks payable, as follows:

5 (a) One check made payable to "The Chanler Group in Trust for
6 OEHHA" in the amount of \$11,250.00 (or 75% of any net penalty after
7 reduction pursuant to Section 4.2);

8 (b) One check to "The Chanler Group in Trust for Brimer" in the
9 amount of \$3,750.00 (or 25% of any net penalty after reduction pursuant to
10 Section 4.2); and

11 (c) One check to "The Chanler Group" in the amount of \$63,000.00.

12 **4.4.2 Issuance of 1099 Forms.** After the Consent Judgment has been approved
13 and the settlement funds have been transmitted to plaintiff's counsel, SA&E shall issue three
14 separate 1099 forms, as follows:

15 (a) The first 1099 shall be issued to the Office of Environmental Health
16 Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of
17 \$11,250.00 (or 75% of any net penalty after reduction pursuant to Section 4.2);

18 (b) The second 1099 shall be issued to Brimer in the amount of \$3,750.00 (or
19 25% of any net penalty after reduction pursuant to Section 4.2), whose address and tax
20 identification number shall be furnished upon request; and

21 (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-3171522) in
22 the amount of \$63,000.00.

23 **4.4.3 Payment Address:** All payments to the Chanler Group shall be delivered
24 to the following payment address:

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

1 **5. CLAIMS COVERED AND RELEASE**

2 **5.1 Brimer's Releases of Defendants**

3 5.1.1 This Consent To Judgment is a full, final, and binding resolution between Brimer,
4 on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or
5 assignees, and the general public, and Defendants and their parents, shareholders, divisions,
6 subdivisions, subsidiaries, partners, affiliates, and sister companies, attorneys, successors, and
7 assigns ("Defendant Releasees"), and all entities to whom SA&E directly or indirectly distributed
8 or sold Covered Products, including but not limited to Burlington, Tuesday Morning,
9 distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees
10 ("Downstream Defendant Releasees") of any violation of Proposition 65 that has been or could
11 have been asserted against Defendant Releasees and Downstream Defendant Releasees
12 regarding the failure to warn about exposure to the Listed Chemicals arising in connection with
13 Covered Products manufactured, sourced, distributed, or sold by Defendants and Defendant
14 Releasees prior to the Effective Date. SA&E's, Tuesday Morning's and Burlington's compliance
15 with this Consent To Judgment shall constitute compliance with Proposition 65 with respect to
16 the Listed Chemicals in the Covered Products after the Effective Date.

17 5.1.2 Brimer on behalf of himself, his past and current agents, representatives,
18 attorneys, successors, and/or assignees, and the general public, hereby waives with respect to
19 Covered Products all rights to institute or participate in, directly or indirectly, any form of legal
20 action and releases all claims, including, without limitation, all actions, and causes of action, in
21 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or
22 expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of any
23 nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"),
24 against Defendants, Defendant Releasees and Downstream Defendant Releasees that arise under
25 Proposition 65 or any other statutory or common law claims that were or could have been
26 asserted in the public interest, as such claims relate to Defendants', Defendant Releasees', and
27

1 Downstream Defendant Releasees' alleged failure to warn about exposures to the Listed
2 Chemicals contained in the Covered Products.

3 5.1.3 Brimer also, in his individual capacity only and *not* in his representative capacity,
4 provides a general release herein which shall be effective as a full and final accord and
5 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
6 damages, losses, claims, liabilities and demands of Brimer of any nature, character or kind,
7 known or unknown, suspected or unsuspected, arising out of the subject matter of the
8 Complaint as to Covered Products manufactured, distributed or sold by Defendants and
9 Defendant Releasees. Brimer acknowledges that he is familiar with Section 1542 of the California
10 Civil Code, which provides as follows:

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

16 Brimer, in his individual capacity only and *not* in his representative capacity, expressly
17 waives and relinquishes any and all rights and benefits which he may have under, or which may
18 be conferred on him by the provisions of Section 1542 of the California Civil Code as well as
19 under any other state or federal statute or common law principle of similar effect, to the fullest
20 extent that he may lawfully waive such rights or benefits pertaining to the released matters. In
21 furtherance of such intention, the release hereby given shall be and remain in effect as a full and
22 complete release notwithstanding the discovery or existence of any such additional or different
23 claims or facts arising out of the released matters.

24 The releases described in Sections 5.1.1, 5.1.2, and 5.1.3 are expressly limited to those
25 claims that arise under Proposition 65, as such claims relate to Defendants' and Defendant
26 Releasees' alleged failures to warn about exposures to or identification of the Listed Chemicals
27 contained in the Covered Products and as such claims are identified in the Proposition 65 60-Day
Notices to Defendants and to the extent that any alleged violations occur no later than thirty (30)

1 days after the Effective Date. The releases described in Sections 5.1.1, 5.1.2, and 5.1.3 do not
2 release any person, party or entity from any liability for any violation of Proposition 65
3 regarding the Covered Products that occurs more than thirty (30) days after the Effective Date.

4 The Parties further understand and agree that the releases described in Sections 5.1.1,
5 5.1.2, and 5.1.3 shall not extend upstream to any entities, other than Defendants, that
6 manufactured the Covered Products or any component parts thereof, or any distributors or
7 suppliers who sold the Covered Products or any component parts thereof to Defendants.

8 5.1.4 Upon court approval of the Consent To Judgment, the Parties waive their
9 respective rights to a hearing or trial on the allegations of the Complaint.

10 **5.2 Defendants' Release of Brimer**

11 5.2.1 Defendants waive any and all claims against Brimer, his attorneys, and other
12 representatives for any and all actions taken or statements made (or those that could have been
13 taken or made) by Brimer and his attorneys and other representatives, whether in the course of
14 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
15 and/or with respect to the Covered Products.

16 5.2.2 Defendants also provide Brimer with a general release herein which shall be
17 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
18 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
19 Defendants of any nature, character or kind, known or unknown, suspected or unsuspected,
20 arising out of the subject matter of the Action. Defendants acknowledge that it is familiar with
21 Section 1542 of the California Civil Code, which provides as follows:

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

26 Defendants expressly waive and relinquish any and all rights and benefits that
27 they may have under, or which may be conferred on it by the provisions of Section 1542

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

7 **6. SEVERABILITY**

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

12 **7. COURT APPROVAL**

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

16 **8. GOVERNING LAW**

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

19 **9. NOTICES**

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

22 For SA&E International Bags & Accessories, LLC, dba Rugged Equipment: 23 Abe and Solomon Shalam (Presidents) 24 SA&E International Bags & Accessories LLC 10 West 33 rd Street, Suite 1217 25 New York, NY 10001	26 With a copy to their counsel: Robert A. Schachter, Esq. Akabas & Sproule Attorneys at Law 488 Madison Avenue New York, N.Y. 10022 Russell Allyn, Esq. Buchalter Nemer 1000 Wilshire Boulevard Suite 1500 Los Angeles, CA 90017
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<p>1 For Tuesday Morning Corp.:</p> <p>2 Kathleen Mason, President 3 Tuesday Morning Corp. 4 6250 LBJ Freeway 5 Dallas, TX 75240</p>	<p>With a copy to their counsel:</p> <p>Douglas J. Munro, Esq. Munro, Smigliani & Jordan LLP 4330 La Jolla Village Dr., Suite 340, San Diego, CA</p>
<p>5 For Burlington Coat Factory Warehouse 6 Corp.:</p> <p>7 Stacy Haigney 8 Vice President, Assistant General Counsel 9 Burlington Coat Factory 10 1400 Broadway, 11th Floor 11 New York, NY 10018</p>	<p>With a copy to their counsel:</p> <p>Jeffrey Margulies, Esq. Fulbright & Jaworski 555 South Flower Street, Forty-First Floor Los Angeles, California 90071</p>
<p>11 For Brimer:</p> <p>12 Proposition 65 Coordinator 13 The Chanler Group 14 2560 Ninth Street 15 Parker Plaza, Suite 214 16 Berkeley, CA 94710-2565</p>	

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

19 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

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

22 **11. MODIFICATION**

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

1 **12. 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 To Judgment. In furtherance of
4 obtaining such approval, Brimer and Defendants agree to mutually employ reasonable efforts to
5 support the entry of this agreement as a Consent To Judgment and obtain approval of the
6 Consent To Judgment - sufficient to render a formal judgment approving this agreement - by the
7 Court in a timely manner. Any effort by any of Defendants to impede judicial approval of this
8 Consent To Judgment shall subject such defendant to liability for attorney fees and costs
9 incurred by plaintiff or his counsel in their efforts to meet or oppose such defendant's impeding
10 conduct.

11 **13. ENTIRE AGREEMENT**

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

18 **14. ATTORNEY'S FEES**

19 14.1 A Party who unsuccessfully brings or contests an action arising out of this
20 Consent To Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees
21 and costs unless the unsuccessful Party has acted with substantial justification. For purposes of
22 this Consent To Judgment, the term substantial justification shall carry the same meaning as
23 used in the Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, *et seq.*

24 14.2 Except as specifically provided in the above paragraph and in Section 5.1, each
25 Party shall bear its own costs and attorney's fees in connection with this action.

26 14.3 Nothing in this Section 14 shall preclude a Party from seeking an award of
27 sanctions pursuant to law.

1 **15. COUNTERPARTS, FACSIMILE SIGNATURES**


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

5 **16. AUTHORIZATION**

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

9 **IT IS SO AGREED**

10

<p>11 Dated: December 14, 2011</p> <p>12 </p> <p>13 _____ Plaintiff Russell Brimer</p>	<p>Dated: December __, 2011</p> <p>_____</p> <p>Abe Shalam SA&E International Bags & Accessories, LLC.</p>
<p>15 Dated: December __, 2011</p> <p>_____</p> <p>Kathleen Mason, President Tuesday Morning Corp.</p>	<p>Dated: December __, 2011</p> <p>_____</p> <p>Stacey Haigney Burlington Coat Factory Warehouse Corp.</p>

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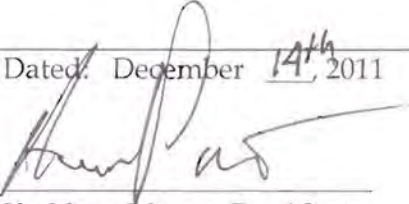
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8 terms and conditions of this Consent To Judgment.

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10 **IT IS SO AGREED**

11 Dated: December __, 2011 12 _____ 13 Plaintiff Russell Brimer	Dated: December __, 2011 14 _____ 15 Abe Shalam 16 SA&E International Bags & Accessories, 17 LLC.
18 Dated: December <u>14th</u> , 2011 19  20 _____ 21 Kathleen Mason, President 22 Tuesday Morning Corp. 23 <i>ANDREW PARIS, VICE PRESIDENT</i>	Dated: December __, 2011 24 _____ 25 Stacey Haigney 26 Burlington Coat Factory 27 Warehouse Corp.


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8 terms and conditions of this Consent To Judgment.

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<p>11 Dated: December __, 2011</p> <p>12</p> <p>13 _____ Plaintiff Russell Brimer</p>	<p>Dated: December __, 2011</p> <p>_____</p> <p>Abe Shalam SA&E International Bags & Accessories, LLC.</p>
<p>15 Dated: December __, 2011</p> <p>16</p> <p>17 _____ Kathleen Mason, President Tuesday Morning Corp.</p>	<p>Dated: December 19 2011</p> <p> Stacy Haigney Burlington Coat Factory Warehouse Corp.</p>

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8 terms and conditions of this Consent To Judgment.

9 **IT IS SO AGREED**

<p>11 Dated: December __, 2011</p> <p>12</p> <p>13 _____</p> <p>14 Plaintiff Russell Brimer</p>	<p>11 Dated: December 13, 2011</p> <p>12 </p> <p>13 _____</p> <p>14 Abe Shalam SA&E International Bags & Accessories, 15 LLC.</p>
<p>16 Dated: December __, 2011</p> <p>17</p> <p>18 _____</p> <p>19 Kathleen Mason, President Tuesday Morning Corp.</p>	<p>16 Dated: December __, 2011</p> <p>17</p> <p>18 _____</p> <p>19 Stacey Haigney Burlington Coat Factory Warehouse Corp.</p>