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12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF ALAMEDA
15 UNLIMITED CIVIL JURISDICTION

16
17 RUSSELL BRIMER,
18 Plaintiff,

19 v.

20 JAZWARES, INC., and DOES 1-150,
21 inclusive,
22 Defendants.

Case No. RG13672019

**[PROPOSED]
CONSENT JUDGMENT**

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28 CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Jazwares, Inc.**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer”) and Jazwares, Inc. (“Jazwares”), with Brimer and Jazwares collectively referred to as the “parties,” and individually as a “party.” Brimer is an individual residing in the State of California who seeks to promote awareness of exposure to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer and commercial products. Jazwares employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6, *et seq.* (“Proposition 65”).

11 **1.2 General Allegations**

12 Brimer alleges that Jazwares has manufactured, imported, distributed and/or sold headphones containing di(2-ethylhexyl)phthalate (“DEHP”) without the requisite Proposition 65 warnings. DEHP is on the Proposition 65 list as known to cause birth defects and other reproductive harm.

15 **1.3 Product Description**

16 As used in this Consent Judgment, “Products” shall mean headphones, earbuds and/or earphones containing DEHP including, but not limited to, *Star Wars Folding Stereo Headphones, #15280 – 03085 – HP, #11005-081011HP (#6 81326 15280 4)* and *Nickelodeon Fanboy & ChumChum Multi-Device Stereo Headphones, Item # 19120 (#6 81326 19120 9)*, manufactured, imported, distributed and/or sold by Jazwares for sale in the State of California.

21 **1.4 Notices of Violation**

22 On December 21, 2012, Brimer served Jazwares and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided recipients with notice alleging that Jazwares was in violation of Proposition 65 for failing to warn consumers and customers that its vinyl headphone cables exposed users in State of California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

27 On June 10, 2013, Brimer also served Jazwares and public enforcers with a document entitled “Supplemental 60-Day Notice of Violation” (the “Supplemental Notice”) that provided

1 Jazwares and such public enforcers with notice of alleged violations of Proposition 65 for failing to
2 warn consumers that headphones as well as vinyl headphone cables exposed users in California to
3 DEHP. Until the sixty-sixth (66th) day after the date of issuance of the Supplemental Notice, the
4 definition of Products herein shall only include vinyl headphone cables containing DEHP. After
5 sixty-six (66) days have passed from the date of the Supplemental Notice, the definition of Products
6 herein shall be deemed to also include headphones containing DEHP, provided that no authorized
7 public prosecutor has, prior to that date, filed a Proposition 65 enforcement action based on the
8 Supplemental Notice. If a public prosecutor intervenes before the 66th day, either Party shall have
9 the right to terminate this Agreement and any funds paid by Jazwares pursuant to Section 3 or 4 will
10 be refunded in their entirety to Jazwares. The Notice and Supplemental Notice are referred to
11 collectively herein as the “Notices.”

12 **1.5 Complaint**

13 On or about March 19, 2013, Brimer filed a complaint in the Superior Court in and for the
14 County of Alameda against Jazwares, Inc. and Does 1 through 150, *Brimer v. Jazwares, Inc., et al.*,
15 Case No. RG13672019, alleging violations of Proposition 65, based on the alleged exposures to
16 DEHP contained in certain vinyl headphone cables containing DEHP sold by Jazwares
17 (“Complaint”). Following the expiration of the 66 days after Brimer’s issuance of the
18 Supplemental Notice referred to in Section 1.4 above, the Complaint shall be deemed amended to
19 include allegations that the Products herein described contained DEHP.

20 **1.6 No Admission**

21 Jazwares denies the material, factual and legal allegations contained in Brimer’s Notices and
22 Complaint and maintains that all products that it has sold, manufactured, imported and/or
23 distributed in the State of California, including the Products, have been and are in compliance with
24 all laws. Nothing in this Consent Judgment shall be construed as an admission by Jazwares of any
25 fact, finding, issue of law, or violation of law, nor shall compliance with this Consent Judgment
26 constitute or be construed as an admission by Jazwares of any fact, finding, conclusion, issue of
27 law, or violation of law. However, this Section shall not diminish or otherwise affect Jazwares’
28 obligations, responsibilities and duties under this Consent Judgment.

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1.7 Consent to Jurisdiction

For purposes of this Consent Judgment only, the parties stipulate that this Court has jurisdiction over Jazwares as to the allegations contained in the Complaint, that venue is proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment.

1.8 Execution Date

For purposes of this Consent Judgment, the term “Execution Date” shall mean the date this Consent Judgment is signed by both parties.

1.9 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” shall mean the date the Court enters Judgment pursuant to the terms of this Consent Judgment.

1.10 Accessible Component

For purposes of this Consent Judgment, the term “Accessible Component” means a component of the Products that could be touched by a person during reasonably foreseeable use.

2. INJUNCTIVE RELIEF: REFORMULATION

2.1 Reformulation Standard

Reformulated Products are Products containing DEHP in concentrations of less than 0.1 percent (1,000 parts per million) in each Accessible Component when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any other methodology utilized by federal or state agencies for the purpose of determining DEHP content in a solid substance.

2.2 Reformulation Commitment

Commencing on March 1, 2014, all Products manufactured, produced, assembled, imported, distributed, shipped, sold and/or offered by Jazwares for sale in the State of California shall qualify as Reformulated Products as defined in Section 2.1 above.

2.3 Vendor Notification Requirement

To the extent that it has not already done so, no more than ten (10) days after the Execution Date, Jazwares shall provide the reformulation standards specified in Section 2.1 for Reformulated

1 Products to any and all of its vendors of Products, including headphones, earbuds, earphones, and
2 each Accessible Component consisting of or containing vinyl/PVC materials, and shall instruct
3 each vendor to use its best efforts to provide only headphones, earbuds, earphones and Accessible
4 Component(s) with vinyl/PVC materials that meet the Reformulation Standard set forth in Section
5 2.1.

6 **3. PAYMENT OF CIVIL PENALTIES**

7 In settlement of all the claims referred to in this Consent Judgment, Jazwares shall pay a total
8 of \$49,500 in accordance with this Section. Each penalty payment will be allocated in accordance
9 with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to
10 the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
11 25% of the penalty remitted to Brimer, as follows:

12 **3.1 Initial Civil Penalty.** Jazwares shall pay an initial civil penalty in the amount of
13 \$15,000. Jazwares shall issue two separate checks made payable as follows: (a) the first to
14 “OEHHA” in the amount of \$11,250 due within five (5) days of the Execution Date; and (b) the
15 second to “The Chanler Group in Trust for Russell Brimer” in the amount of \$3,750 due within
16 five (5) days of the Execution Date and to be held in trust until Court approval of this Consent
17 Judgment. All penalty payments shall be delivered to the addresses listed in Section 3.4 below.

18 **3.2 Final Civil Penalty.** Jazwares shall pay a final civil penalty of \$30,000 on or before
19 March 15, 2014. The final civil penalty shall be waived in its entirety if an officer of Jazwares
20 provides Brimer with written certification that, as of the date of the certification and continuing into
21 the future, Jazwares has met the Reformulation Standard specified in Section 2.1 above such that
22 pursuant to Section 2.2 above all Products manufactured, produced, assembled, imported,
23 distributed, shipped, sold or offered for sale in State of California are Reformulated Products.
24 Brimer must receive any such certification on or before March 1, 2014, and time is of the essence.
25 Unless waived in its entirety, Jazwares shall issue two separate checks for any remaining portion of
26 the final civil penalty, with 75% of the funds remitted to OEHHA and 25% of the funds remitted to
27 “The Chanler Group in Trust for Russell Brimer.”

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1 **3.3 Payment in Lieu of Civil Penalty.** Jazwares shall pay the sum of \$4,500 to Silent
2 Spring Institute (“Silent Spring”), a not-for-profit institution, in lieu of further civil fines pursuant to
3 California Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11,
4 § 3202(b) within five (5) days of the Execution Date. Silent Spring will use such funds in one or
5 more of the following ways: (a) to continue its work identifying the links between exposure to
6 environmental chemicals including lead, DEHP and other phthalates such as di-n-butyl (“DBP”) and
7 butyl benzyl phthalate (“BBP”) and reproductive and developmental harm, as well as educating the
8 public about such potential exposures; (b) to conduct exposure- and risk-based prioritization of
9 chemicals listed under Proposition 65, or chemicals OEHHA has identified as candidates for listing,
10 in order to identify exposures of potential public health significance; (c) to monitor compliance with
11 the reformulation requirements of this and other, similar consent judgments addressing Proposition
12 65-listed chemical exposures; or (d) to conduct additional exposure measurements that evaluate the
13 levels of chemical exposures to users of products that contain lead, DEHP, DBP and BBP.

14 **3.4 Payment Procedures**

15 **3.4.1. Issuance of Payments.** Payments shall be delivered as follows:

16 (a) All payments owed to Brimer and Silent Spring, pursuant to Sections
17 3.1 through 3.3, shall be delivered to the following payment address:

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

23 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to
24 Sections 3.1 through 3.2, shall be delivered directly to OEHHA (Memo line “Prop 65 Penalties”)
25 at the following addresses:

26 For United States Postal Service Delivery:

27 Mike Gyrics
28 Fiscal Operations Branch Chief
 Office of Environmental Health Hazard Assessment
 P.O. Box 4010
 Sacramento, CA 95812-4010

1 For Non-United States Postal Service Delivery:

2 Mike Gyrics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

5 With a copy of the checks payable to OEHHA mailed to The Chanler Group at the address set forth
6 above in 3.4.1(a), as proof of payment to OEHHA.

7 **3.4.2 Issuance of 1099 Forms.** After each penalty payment, Jazwares shall issue
8 separate 1099 forms for each payment to (a) Brimer, whose address and tax identification number
9 shall be furnished upon request after the Execution Date, and (b) OEHHA, who shall be identified
10 as “California Office of Environmental Health Hazard Assessment” (EIN: 68-0284486) in the
11 1099 form, to be delivered directly to OEHHA, P.O. Box 4010, Sacramento, CA 95814, (c) Silent
12 Spring Institute, 29 Crafts Street, Newton, Massachusetts 02458, whose information shall be
13 furnished upon request after the Execution Date, and (d) “The Chanler Group” (EIN: 94-3171522)
14 to the address set forth in Section 3.4.1(a) above.

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

16 The parties acknowledge that Brimer and his counsel offered to resolve this dispute without
17 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
18 issue to be resolved after the material terms of the agreement had been settled. Jazwares then
19 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
20 finalized. The parties then attempted to (and did) reach an accord on the compensation due to
21 Brimer and his counsel under general contract principles and the private attorney general doctrine
22 codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual
23 execution of this agreement. Jazwares shall pay \$49,000 for fees and costs incurred as a result of
24 investigating, bringing this matter to Jazwares’ attention, and negotiating a settlement in the public
25 interest, as well as the fees and costs incurred (and to be incurred) obtaining the Court’s approval of
26 this Consent Judgment in the public interest. Jazwares shall issue a separate 1099 for fees and costs
27 (EIN: 94-3171522), shall make the check payable to “The Chanler Group” to be held in its trust

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1 account until Court approval of this Consent Judgment and shall deliver payment within five (5)
2 business days of the Execution Date, to the address listed in Section 3.4.1(a) above.

3 **5. CLAIMS COVERED AND RELEASED**

4 **5.1 Brimer's Release of Jazwares**

5 Brimer, acting on his own behalf and in the public interest, waives all rights to institute or
6 participate in, directly or indirectly, any form of legal action and releases Jazwares, its parents,
7 subsidiaries, affiliated entities, successors, and/or assignees, that are under common ownership,
8 directors, officers, employees, shareholders, attorneys, and each entity to whom Jazwares directly or
9 indirectly distributes or sells Products, including, but not limited to, downstream distributors,
10 wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees
11 ("Releasees"), from all claims including, without limitation, all actions and causes of action in law
12 or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or
13 expenses, investigation fees, expert fees, and attorneys' fees of any nature whatsoever arising from
14 any violation of Proposition 65 up through the Effective Date based on exposure to DEHP from the
15 Products. Compliance with the terms of this Consent Judgment constitutes compliance with
16 Proposition 65 with respect to exposures to DEHP from the Products.

17 Brimer, also, in his individual capacity only and *not* in his representative capacity, provides a
18 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
19 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
20 liabilities and demands of Brimer of any nature, character or kind, whether known or unknown,
21 suspected or unsuspected, limited to and arising out of alleged or actual exposures to the DEHP in
22 the Products manufactured, imported, distributed and/or sold by Releasees for sale in the State of
23 California prior to the Effective Date.

24 **5.2 Jazwares's Release of Brimer**

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

1 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with
2 respect to the Products.

3 **6. COURT APPROVAL**

4 This Consent Judgment is not effective until it is approved and entered by the Court and shall
5 be null and void if, for any reason, it is not approved and entered by the Court within one year after
6 it has been fully executed by all parties. In the event the Court does not approve this Consent
7 Judgment within one year, the funds paid pursuant to Sections 3 and 4 of this Consent Judgment
8 shall be returned to Jazwares.

9 **7. SEVERABILITY**

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

13 **8. GOVERNING LAW**

14 The terms of this Consent Judgment shall be governed by the laws of the State of California
15 and the obligations of Jazwares hereunder as to the Products apply only within the State of
16 California. In the event that Proposition 65 is repealed, preempted or is otherwise rendered
17 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
18 rendered inapplicable or no longer required as a result of any such repeal or preemption or rendered
19 inapplicable by reason of law generally as to the Products, then Jazwares shall notify Brimer and
20 his counsel and may have no further obligations pursuant to this Consent Judgment with respect to,
21 and to the extent that, the Products are so affected. Nothing in this Consent Judgment shall be
22 interpreted to relieve Jazwares from any obligation to comply with any pertinent state or federal
23 toxics control law.

24 **9. NOTICES**

25 Unless specified herein, all correspondence and notices required to be provided pursuant to
26 this Consent Judgment shall be in writing and (i) personally delivered, (ii) sent by first-class,
27 (registered or certified mail) return receipt requested, or (iii) sent by overnight courier to one party
28 from the other party at the following addresses:

1 To Brimer:

2 Proposition 65 Coordinator
3 The Chanler Group
4 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

5 To Jazwares:

6 David Neustein, C.O.O.
7 Jazwares, Inc.
1067 Shotgun Road
8 Sunrise, FL 33326

9 With a copy to:

10 Melissa A. Jones
11 STOEL RIVES LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814

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

14 **10. COUNTERPARTS; FACSIMILE/PDF SIGNATURES**

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

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

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

21 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

22 Brimer and Jazwares agree to mutually employ their, and their counsel's, best efforts to
23 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
24 Judgment by the Court in a timely manner. The parties acknowledge that, pursuant to California
25 Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this
26 Consent Judgment, which Brimer shall draft and file, and Jazwares shall not oppose. If any third
27 party objection to the noticed motion is filed, Brimer and Jazwares shall work together to file a joint
28 reply or separate replies if the parties so desire and appear at any hearing before the Court. This

1 provision is a material component of the Consent Judgment and shall be treated as such in the event
2 of a breach. If the Court does not grant the motion to approve this Consent Judgment, and if the
3 parties choose not to pursue a modified Consent Judgment within 30 days after the Court's denial of
4 the motion to approve, then, upon remittitur, any and all payments made pursuant to Sections 3 and
5 4 of this Consent Judgment will be returned to Jazwares.

6 **13. MODIFICATION**

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

10 **14. AUTHORIZATION**

11 The undersigned are authorized to execute this Consent Judgment and have read, understood,
12 and agree to all of the terms and conditions of this Consent Judgment.

13 AGREED TO:

AGREED TO:

14 Date: July 12, 2013 _____

Date: _____

15
16 By:  _____
17 Plaintiff, Russell Brimer

By: _____
David Neustein, C.O.O.
Defendant, Jazwares, Inc.

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13 AGREED TO:
14 Date: _____

AGREED TO:
Date: July 12, 2013

16 By: _____
17 Plaintiff, Russell Brimer

By: 
David Neustein, E.O.O.
Defendant, Jazwares, Inc.

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