

1 Brian C. Johnson, State Bar No. 235965
2 Josh Voorhees, State Bar No. 241436
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 **FOR THE COUNTY OF ALAMEDA UNLIMITED CIVIL JURISDICTION**

13 RUSSELL BRIMER,
14 Plaintiff,
15 vs.
16 NEATFREAK GROUP INC.; *et al.*,
17 Defendants.

18 CASE NO. RG13663979
19 **[PROPOSED] CONSENT JUDGMENT**
20 (Health & Safety Code § 25249.6 *et seq.*)

21
22
23
24
25
26
27
28

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Russell Brimer (“Brimer”),
4 and defendants, Neatfreak Group Inc. (“Neatfreak”) and Bed Bath & Beyond, Inc. (“BB&B”), with
5 Brimer, Neatfreak, and BB&B each individually referred to as a “Party” and collectively as the
6 “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendants**

12 Brimer alleges that Neatfreak and BB&B each employ ten or more persons, and is a “person in
13 the course of doing business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of
14 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”). Neatfreak denies that it
15 employs ten or more persons and asserts that it is not a “person in the course of doing business” for the
16 purposes of Proposition 65, but consents to jurisdiction only as set forth below in Section 1.9 of this
17 Consent Judgment.

18 **1.4 General Allegations**

19 Brimer alleges that Neatfreak and BB&B sell or distribute for sale in California Neatfreak
20 brand laundry totes with vinyl/PVC handles containing lead, without first providing the clear and
21 reasonable exposure warning required by Proposition 65. Lead is listed pursuant to Proposition 65 as
22 a chemical known to cause birth defects or other reproductive harm.

23 **1.5 Product Description**

24 The products that are covered by this Consent Judgment are Neatfreak brand laundry totes with
25 vinyl/PVC handles containing lead that are imported, manufactured, sold, or distributed for sale by
26 Neatfreak and/or BB&B in California including, but not limited to, the *Everfresh Single Fashion*
27 *Laundry Tote, A-05645-004X1-EEEF (#0 61648 90488 4)* (collectively “Products”).
28

1 **1.6 Notices of Violation**

2 On August 1, 2012, Brimer served Neatfreak, Neatfreak Group Corp., and certain requisite
3 public enforcement agencies with a “60-Day Notice of Violation” (“Notice”), alleging that Neatfreak
4 violated Proposition 65 by failing to warn its customers and consumers in California that the Products
5 expose users to lead.

6 Thereafter, on September 21, 2012, Brimer sent a “Supplemental 60-Day Notice of Violation”
7 (“Supplemental Notice”) which, in addition to the allegations made in the Notice, contained the
8 additional allegation that Neatfreak’s retail customer, BB&B, also violated Proposition 65 by failing
9 to warn consumers in California that the Products expose users to lead. The Notice and Supplemental
10 Notice are collectively referred to as the “Notices.”

11 To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently
12 prosecuting the allegations set forth in the Notices.

13 **1.7 Complaint and Answer**

14 On January 13, 2013, Brimer filed the instant action against Neatfreak and BB&B
15 (“Complaint”) for the alleged violations of Health and Safety Code section 25249.6 that are the
16 subject of the Notice. On March 11, 2013, Neatfreak and BB&B filed an answer to the Complaint,
17 denying all allegations and asserting certain affirmative defenses.

18 **1.8 No Admission**

19 Neatfreak and BB&B deny the material, factual, and legal allegations contained in the Notice and
20 Complaint, and they maintain that all of the products that they have sold and distributed in California,
21 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
22 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
23 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
24 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
25 not, however, diminish or otherwise affect Neatfreak’s and BB&B’s obligations, responsibilities, and
26 duties under this Consent Judgment.

27
28

1 **1.9 Consent to Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over
3 Neatfreak and BB&B as to the allegations in the Complaint, that venue is proper in Alameda County,
4 and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment.

5 **1.10 Effective Date**

6 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date this Consent
7 Judgment by all Parties is fully executed by the Parties.

8 **2. INJUNCTIVE RELIEF: REFORMULATION**

9 Commencing on the Effective Date and continuing thereafter, if either party offers the
10 Products for sale in California, Neatfreak and BB&B will manufacture for sale and purchase for sale
11 in California, “Reformulated Products.” For purposes of this Consent Judgment, Reformulated
12 Products comprise Neatfreak brand laundry totes that contain a maximum of 90 parts per million lead
13 content by weight in any accessible component (i.e., any component that can be touched during
14 reasonably a foreseeable use) when analyzed pursuant to Environmental Protection Agency testing
15 methodologies 3050B and 6010B, and that yield a result of no more than 1.0 micrograms of lead when
16 sampled pursuant to the NIOSH 9100 testing protocol and analyzed pursuant to EPA testing
17 methodologies 3050B and 6010B, or equivalent methodologies used by federal or state agencies to
18 determine lead content in a solid substance.

19 **3. MONETARY PAYMENTS**

20 **3.1 Payments Pursuant to Health & Safety Code Section 25249.7(b)**

21 Pursuant to Health & Safety Code section 25249.7(b), Neatfreak shall pay \$12,500 in civil
22 penalties. Each penalty payment shall be allocated according to Health and Safety Code section
23 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the California Office of
24 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty paid to
25 Brimer.

26

27

28

1 **3.1.1 Initial Civil Penalty**

2 Within five days of the Effective Date, Neatfreak shall make an initial civil penalty
3 payment of \$3,000. Neatfreak shall provide its payment in two checks for the following amounts
4 made payable to: (a) "Cox, Castle & Nicholson LLP in Trust for OEHHA" in the amount of \$2,250;
5 and (b) "Cox, Castle & Nicholson LLP in Trust for Russell Brimer" in the amount of \$750. Neatfreak
6 shall deliver the initial civil penalty payments to its counsel to hold in trust until such time as the
7 Court approves the Consent Judgment.

8 **3.1.2 Final Civil Penalty**

9 On December 1, 2013, Neatfreak will make a final civil penalty payment of \$9,000.
10 Pursuant to title 11 California Code of Regulations section 3203(c), the final civil penalty payment
11 will be waived in its entirety if, no later than September 1, 2013, an officer of Neatfreak certifies in
12 writing to Brimer's counsel that, as of the date of such certification one-hundred percent (100%) of
13 the Products sold in California are Reformulated Products as defined by Section 2, and that Neatfreak
14 will continue to only offer Reformulated Products in California in the future. The option to certify
15 the reformulation of the Products in lieu of making the final civil penalty payment constitutes a
16 material term of this agreement, and time is of the essence. Unless waived, final civil penalty
17 payments to Brimer (\$2,250) and OEHHA (\$6,750) shall be delivered to the addresses provided in
18 Section 3.3.

19 **3.2 Reimbursement of Plaintiff's Attorneys' Fees and Costs**

20 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
21 reaching terms on the amount of fees and costs to be reimbursed by Neatfreak, thereby leaving the
22 issue to be resolved after the material terms of the agreement had been settled. Shortly after all other
23 settlement terms had been finalized, Neatfreak expressed a desire to resolve the fees and costs. The
24 Parties then attempted to (and did) reach an accord on the compensation due Brimer and his counsel
25 under general contract principles and the private attorney general doctrine codified at Code of Civil
26 Procedure section 1021.5 for all work performed in this matter exclusive of fees and costs incurred
27 on appeal, if any. Under these legal principles, within five days of the Effective Date, Neatfreak and
28 BB&B shall pay \$24,000 for the fees and costs incurred investigating, litigating, and enforcing this

1 matter, including the fees and costs to be incurred drafting, negotiating, and obtaining the Court's
2 approval of this Consent Judgment in the public interest.

3 **3.3 Payment Procedures**

4 **3.3.1 Funds Held in Trust**

5 All payments required by Sections 3.1 and 3.2 shall be delivered to Cox, Castle &
6 Nicholson LLP within five (5) business days from the date this Consent Judgment is fully executed by
7 the parties and shall be held in trust by Cox, Castle & Nicholson LLP until such time as the Court
8 grants the motion for judicial approval of this Consent Judgment contemplated by Section 10.

9 Payments delivered to Cox, Castle & Nicholson LLP shall be made payable, as
10 follows:

11 (a) One check made payable to Cox, Castle & Nicholson LLP in Trust for OEHHA
12 in the amount of \$2,250;

13 (b) One check made payable to Cox, Castle & Nicholson LLP in Trust for Russell
14 Brimer in the amount of \$750; and

15 (c) One check made payable to Cox, Castle & Nicholson LLP in Trust for The
16 Chanler Group in the amount of \$24,000.

17 The attorney of record for Neatfreak and Bed Bath & Beyond shall: (a) confirm in
18 writing within five (5) business days of receipt that the funds have been deposited in a trust account;
19 and (b) within two (2) business days of the date upon which the Court grants the motion for judicial
20 approval of the Consent Judgment contemplated by Section 10, Neatfreak and BB&B's attorneys shall
21 deliver the following payments:

22 (a) One check made payable to OEHHA in the amount of \$2,250, delivered to
23 OEHHA pursuant to Section 3.3.3 hereof;

24 (b) One check made payable to Russell Brimer in the amount of \$750 delivered to
25 the Chanler Group; and

26 (c) One check made payable to The Chanler Group in the amount of \$24,000 also
27 delivered to the Chanler Group.
28

1 **3.3.2 Payment Address for Brimer and The Chanler Group**

2 All payments to Brimer and his counsel shall be delivered to the following address:

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

8 **3.3.3 Payment Address for OEHHA**

9 Upon the Court's approval of the Consent Judgment, all payments to OEHHA made
10 pursuant to Section 3.1, shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at the
11 following addresses:

12 Mike Gyrics
13 Fiscal Operations Branch Chief
14 Office of Environmental Health Hazard Assessment
15 P.O. Box 4010
16 Sacramento, CA 95812-4010

17 With a copy of the checks payable to OEHHA mailed to The Chanler Group at the address payment
18 address provided in Section 3.3, as proof of payment to OEHHA.

19 **3.3.4 Tax Documentation**

20 For the payments made under this Consent Judgment, Neatfreak agrees to provide a
21 completed IRS 1099 form to the following individuals or entities:

22 (a) "Russell Brimer" whose address and tax identification number shall be provided
23 after this Consent Judgment is fully executed by the Parties;

24 (b) "The Chanler Group" (EIN: 94-3171522) at the address provided in Section
25 3.3.1; and

26 (c) "Office of Environmental Health Hazard Assessment," P.O. Box 4010,
27 Sacramento, CA 95814 (EIN: 68-0284486).

28 **4. CLAIMS COVERED AND RELEASED**

4.1 Brimer's Public Release of Proposition 65 Claims

 Brimer, acting on his own behalf and in the public interest, releases Neatfreak, Neatfreak
Group Corp. and BB&B and their parents, subsidiaries, affiliated entities under common ownership,

1 directors, officers, employees, and attorneys (“Releasees”) and each entity to whom Neatfreak
2 directly or indirectly distributes or sells the Products, including but not limited to its downstream
3 distributors, wholesalers, customers (including, but not limited to, BB&B), retailers, franchisers,
4 cooperative members, licensors and licensees (“Downstream Releasees”) for any violations arising
5 under Proposition 65 for unwarned exposures to lead from the Products sold by Neatfreak and
6 BB&B prior to the Effective Date, as set forth in the Notices. Compliance with the terms of this
7 Consent Judgment constitutes compliance with Proposition 65 with respect to unwarned exposures to
8 lead from the Products sold by Neatfreak and BB&B before the Effective Date, as set forth in the
9 Notices.

10 **4.2 Brimer’s Individual Release of Claims**

11 Brimer, in his individual capacity only and *not* in his representative capacity, also provides a release to
12 Releasees and Downstream Releasees which shall be effective as a full and final accord and
13 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees,
14 damages, losses, claims, liabilities and demands of Brimer of any nature, character or kind, whether
15 known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to lead from
16 the Products sold or distributed for sale by Neatfreak before the Effective Date.

17 **4.3 Neatfreak’s and BB&B’s Release of Brimer**

18 Neatfreak, Neatfreak Group Corp. and BB&B, on their own behalf, and on behalf of their
19 past and current agents, representatives, attorneys, successors, and assignees, hereby waive any and
20 all claims against Brimer and his attorneys and other representatives, for any and all actions taken or
21 statements made by Brimer and his attorneys and other representatives, whether in the course of
22 investigating claims, otherwise seeking to enforce Proposition 65 against them in this matter, or with
23 respect to the Products.

24 **4.4 Intent of Parties**

25 For purposes of this Section 4.4, the “Released Claims” are defined to include all releases
26 provided under this Consent Judgment by Neatfreak, Neatfreak Group Corp., BB&B, and Brimer in
27 their individual capacity only and *not* in any representative capacity, or on behalf of the general public
28 in California. With regard to the Released Claims, it is the intention of the Parties to this Agreement

1 that, upon entry of this Consent Judgment and conclusion of any and all appeals or litigation relating
2 thereto, that this Consent Judgment shall be effective as a full and final accord and satisfaction and
3 release of such claims. In furtherance of this intention, Neatfreak, Neatfreak Group Corp., BB&B and
4 Brimer each represents that it/he is familiar with California Civil Code section 1542, which provides
5 as follows:

6 A GENERAL RELEASE WHICH DOES NOT EXTEND TO CLAIMS WHICH
7 THE CREDITOR DOES NOT KNOW OF SUSPECT TO EXIST IN HIS OR
8 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.

9 Neatfreak, Neatfreak Group Corp., BB&B and Brimer each hereby waives and relinquishes all of the
10 rights and benefits that it/he has, or may have, under California Civil Code section 1542 (as well as
11 any similar rights and benefits which may be available by virtue of any statute or rule of law in any
12 other state or territory of the United States). Neatfreak, Neatfreak Group Corp., BB&B and Brimer
13 each hereby acknowledges that it/he may hereafter discover facts in addition to, or different from,
14 those they now know or believe to be true with respect to the subject of this Consent Judgment and the
15 Released Claims, but that notwithstanding the foregoing, it is each Party's intention hereby to fully,
16 finally, completely, and forever to settle and release each, every, and all of the Released Claims, and
17 that in furtherance of such intention, the releases herein given (with the exception of Brimer's
18 representative release given on behalf of the general public in California) shall be and remain in effect
19 as full and complete general release, notwithstanding the discovery or existence of any such additional
20 or different facts.

21 **5. COURT APPROVAL**

22 This Consent Judgment is not effective until it is approved and entered by the Court and shall be null
23 and void if, for any reason, it is not approved and entered by the Court within one year after it has
24 been fully executed by the Parties.

25 **6. SEVERABILITY**

26 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any
27 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be
28 adversely affected.

1 **7. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the state of California and apply
3 within the state of California. In the event that Proposition 65 is repealed, preempted, or is otherwise
4 rendered inapplicable by reason of law generally, or as to the Products, then Neatfreak and/or BB&B
5 may provide written notice to Brimer of any asserted change in the law, and shall have no further
6 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
7 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Neatfreak and/or BB&B
8 from any obligation to comply with any pertinent state or federal toxics control laws.

9 **8. NOTICES**

10 Unless specified herein, all correspondence and notices required by this Consent Judgment
11 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail, return
12 receipt requested; or (iii) a recognized overnight courier to the following addresses:

13 For Neatfreak:

14 Owen Mellon, President
15 Neatfreak Group Inc.
16 5320 Timberlea Boulevard
17 Mississauga, Ontario
18 CANADA L4W 2S6

19 with a copy to:

20 David P. Waite, Esq.
21 Cox, Castle & Nicholson LLP
22 2049 Century Park East, 28th Floor
23 Los Angeles, California 90067

24 For Bed Bath & Beyond:

25 Kenneth O. Bradley, Esq.
26 Vice President—Litigation
27 Bed Bath & Beyond, Inc.
28 650 Liberty Avenue
 Union, NJ 07083

 with a copy to:

 David P. Waite, Esq.
 Cox, Castle & Nicholson LLP
 2049 Century Park East, 28th Floor
 Los Angeles, California 90067

1 For Brimer:

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

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

9 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

10 This Consent Judgment may be executed in counterparts and by facsimile or portable document
11 format (PDF) signature, each of which shall be deemed an original, and all of which, when taken
12 together, shall constitute one and the same document.

13 **10. POST EXECUTION ACTIVITIES**

14 Brimer agrees to comply with the reporting form requirements referenced in Health and Safety
15 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
16 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
17 furtherance of obtaining such approval, Brimer and Neatfreak and BB&B agree to mutually employ
18 their best efforts, and that of their counsel, to support the entry of this agreement as judgment, and to
19 obtain judicial approval of the settlement in a timely manner. For purposes of this Section, "best
20 efforts" shall include, at a minimum, cooperating on the drafting and filing of the necessary moving
21 papers, and supporting the motion for judicial approval.

22 **11. MODIFICATION**

23 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and upon
24 entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
25 application of any Party and the entry of a modified consent judgment by the Court.

26 **12. AUTHORIZATION**

27 The undersigned are authorized to execute this Consent Judgment and have read, understood, and
28 agree to all of the terms and conditions contained herein.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO:

Date: June 12, 2013

By: 
RUSSELL BRIMER

AGREED TO:

Date: MAY 30, 2013

By: 
Gwen Mellon, President
NEATFREAK GROUP INC.

AGREED TO:

Date: _____

By: _____
Kenneth Bradley, Vice President—Litigation
BED BATH & BEYOND, INC.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO:

Date: _____

By: _____
RUSSELL BRIMER


AGREED TO:

Date: _____

By: _____
Owen Mellon, President
NEATFREAK GROUP INC.

AGREED TO:

Date: July 4 2013

By: 
Kenneth Bradley, Vice President—Litigation
BED BATH & BEYOND, INC.