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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SANTA CLARA
15 UNLIMITED CIVIL JURISDICTION

16 RUSSELL BRIMER,

17 Plaintiff,

18 v.

19 A & E INCORPORATED, *et al.*,

20 Defendant.

Case No. 16CV303618

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Cal. Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer”),
4 and defendant A & E Incorporated (“A & E”), with Brimer and A & E each individually referred to
5 as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Brimer alleges that A & E employs ten or more individuals and is a “person in the course of
12 doing business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health
13 and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that A & E manufactures, imports, sells, distributes, and/or offers for sale or
16 use in California, retractable test leads with exterior coverings containing the phthalate chemical di(2-
17 ethylhexyl) phthalate (“DEHP”), and that it does so without first providing the exposure warning
18 required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to cause
19 birth defects or other reproductive harm.

20 **1.5 Product Description**

21 For purposes of this Consent Judgment “Products” are defined as retractable test leads
22 containing DEHP that are manufactured, imported, sold, or distributed for sale in California by A &
23 E including, but not limited to, the *Lang Tools 10 FT. Retractable Test Leads, Part No. 1140,*
24 *#20915, UPC No. 0 77769 20915 9* identified in the Notice.

25 **1.6 Notice of Violation**

26 On September 7, 2016, Brimer served A & E and all requisite public enforcement agencies
27 with a 60-Day Notice of Violation (“Notice”). The Notice alleges that A & E violated Proposition 65
28 when it failed to warn its customers and consumers in California of the health hazards associated with

1 exposures to DEHP from the Products. No public enforcer has commenced and is diligently
2 prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On December 6, 2016, Brimer filed the instant action (“Complaint”), for the violations of
5 Proposition 65 that are the subject of the Notice.

6 **1.8 No Admission**

7 A & E denies the material, factual, and legal allegations contained in the Notice and
8 Complaint, and maintains that all the products it has manufactured, imported, sold distributed, or
9 distributed for sale in California, including the Products, have been, and are, in compliance with all
10 laws. Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
11 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
12 constitute or be construed as an admission of any fact, finding, conclusion of law, issue of law, or
13 violation of law. This Section shall not, however, diminish or otherwise affect A & E’s obligations,
14 responsibilities, and duties under this Consent Judgment.

15 **1.9 Jurisdiction**

16 For purposes of this Consent Judgment only, the Parties stipulate that the Court has
17 jurisdiction over A & E as to the allegations in the Complaint, that venue is proper in Santa Clara
18 County, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
19 Judgment pursuant to Proposition 65, and Code of Civil Procedure section 664.6.

20 **1.10 Effective Date**

21 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
22 the motion for approval of the Parties’ settlement contemplated by Section 5 is granted by the Court,
23 including the date of any unopposed tentative ruling approving the settlement.

24 **2. INJUNCTIVE RELIEF: REFORMULATION**

25 **2.1 Commitment to Provide Reformulated Products or Warnings**

26 Commencing on the Effective Date, and continuing thereafter, A & E shall only offer either
27 (a) “Reformulated Products;” or (b) Products offered with a clear and reasonable warning pursuant to
28 Section 2.3.

1 **2.2 Reformulated Products Defined**

2 For purposes of this Consent Judgment, Reformulated Products are Products containing no
3 more than 1,000 parts per million (0.1%) DEHP in any component analyzed pursuant to U.S.
4 Environmental Protection Agency testing methodologies 3580A and 8270C or equivalent
5 methodologies used by state or federal agencies to determine DEHP content in a solid substance.

6 **2.3 Clear and Reasonable Warnings**

7 Commencing on the Effective Date and continuing thereafter, for any Products sold or
8 distributed for sale in California by A & E that are not Reformulated Products, A & E will only offer
9 such Products for sale with a clear and reasonable warning in accordance with this Section, or title 27
10 California Code of Regulations section 25600 et seq., as amended from time to time. A & E further
11 agrees that any warning used will be prominently placed in relation to the Product with such
12 conspicuousness when compared with other words, statements, designs, or devices as to render it
13 likely to be read and understood by an ordinary individual under customary conditions of purchase or
14 use. For purposes of this Consent Judgment, a warning satisfying the above criteria that is affixed
15 directly to a Product or its accompanying labeling or packaging that contains the following statement
16 shall be deemed clear and reasonable:

17 **WARNING:** This product contains a chemical known to the
18 State of California to cause cancer and birth
19 defects or other reproductive harm.

20 If A & E sells Products via an internet website to customers or consumers in California, the warning
21 requirements of this Section shall be satisfied if the foregoing warning appears either: (a) on the same
22 web page on which a Product is displayed and/or described; (b) on the same page as the price for the
23 Product; or (c) on one or more web pages displayed prior to purchase during the checkout process.
24 Alternatively, a symbol consisting of a black exclamation point in a yellow or white equilateral
25 triangle may appear adjacent to or immediately following the display, description, price, or checkout
26 listing of the Product, provided that the warning statement appears elsewhere on the same web page
27 in a manner that clearly associates it with the product(s) to which the warning applies.
28

1 **2.4 Grace Period for Existing Inventory of Products/Warning Labels**

2 A & E represents that, prior to entering this Consent Judgment, it implemented a health
3 hazard warning for the Products, which includes the following language: “This product may contain a
4 chemical known to the State of California to cause cancer, or birth defects or other reproductive
5 harm.” Brimer agrees that A & E may continue using this warning until it exhausts its current supply
6 of Products or packaging/labeling bearing this warning statement. Such Products, provided they
7 are/were manufactured, imported, sold, or distributed for sale by A & E prior to the Effective Date,
8 subject to the releases provided under Sections 4.1 and 4.2, below.

9 **3. MONETARY SETTLEMENT TERMS**

10 **3.1 Civil Penalty Payment**

11 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
12 the Notice, Complaint, and this Consent Judgment, A & E shall pay \$3,000 in civil penalties. A &
13 E’s civil penalty payment will be allocated according to Health and Safety Code section
14 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office
15 of Environmental Health Hazard Assessment (“OEHHA”), and the remaining twenty-five percent
16 (25%) of the funds retained by Brimer. A & E shall provide its payment in two checks for the
17 following amount made payable to (a) “OEHHA” in the amount of \$2,250; and (b) “Russell Brimer,
18 Client Trust Account” in the amount of \$750. Brimer’s counsel shall be responsible for delivering
19 OEHHA’s portion of the penalty payment.

20 **3.2 Reimbursement of Attorney’s Fees and Costs**

21 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
22 reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the issue to be
23 resolved after all the material terms of this Consent Judgment had been settled. Shortly after the
24 other settlement terms had been finalized, the Parties negotiated the compensation due to Brimer and
25 his counsel under general contract principles and the private attorney general doctrine codified at
26 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
27 execution of this Consent Judgment. As provided in Section 3.3. below, A & E shall pay
28 \$29,000, for all fees and costs incurred by Brimer through the Effective Date in investigating,

1 bringing this matter to A & E's attention, litigating, and obtaining court approval of the Parties'
2 settlement in the public interest.

3 **3.3 Payments Held in Trust**

4 All payments due under this Consent Judgment shall be held in trust until the Court approves
5 the Parties' settlement. A & E shall deliver the settlement payments to its counsel within fifteen (15)
6 days of the date that this Consent Judgment is fully executed by the Parties. A & E's counsel shall
7 provide Brimer's counsel with written notice following its receipt of the settlement funds.
8 Thereafter, A & E's counsel shall hold the funds in trust until, and disburse the funds to Brimer's
9 counsel within five (5) days after, the Effective Date.

10 **3.4 Payment Address**

11 All payments under this Consent Judgment shall be delivered to:

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

17 **4. CLAIMS COVERED AND RELEASED**

18 **4.1 Brimer's Public Release of Proposition 65 Claims**

19 Brimer, acting on his own behalf and in the public interest, releases A & E and its parents,
20 subsidiaries, affiliated entities under common ownership, directors, officers, employees,
21 shareholders and attorneys ("Releasees") and each entity to whom it directly or indirectly distributes
22 or sells the Products including, but not limited to, its downstream distributors, wholesalers,
23 customers, retailers, franchisers, cooperative members, licensors and licensees (collectively
24 "Downstream Releasees") for any violation arising under Proposition 65 based on any alleged
25 exposure to DEHP from Products manufactured, imported, sold, or distributed for sale by A & E
26 prior to the Effective Date. Compliance with the terms of this Consent Judgment constitutes
27 compliance with Proposition 65 with respect to the alleged or actual failure to warn about exposures
28 to DEHP from Products manufactured, imported, sold, or distributed for sale by A & E after the
Effective Date.

1 **4.2 Brimer's Individual Release of Claims**

2 Brimer, in his individual capacity only and *not* in his representative capacity, also provides a
3 release to A & E, Releasees, and Downstream Releasees that shall be effective as a full and final
4 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
5 attorneys' fees, damages, losses, claims, liabilities, and demands of Brimer of any nature, character or
6 kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
7 exposures to DEHP in Products manufactured, imported, sold, or distributed for sale by A & E before
8 the Effective Date.

9 **4.3 A & E's Release of Brimer**

10 A & E, on its own behalf, and on behalf of its past and current agents, representatives,
11 attorneys, successors, and assignees, hereby waives any and all claims against Brimer and his
12 attorneys and other representatives, for any and all actions taken or statements made by Brimer and
13 his attorneys and other representatives, whether in the course of investigating claims, otherwise
14 seeking to enforce Proposition 65 in this matter, or with respect to the Products.

15 **4.4 Mutual Waiver of California Civil Code Section 1542**

16 The Parties each acknowledge that he/it is familiar with Section 1542 of the Civil Code,
17 which provides as follows:

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

23 The Parties, each on his/its own behalf (and Brimer in his individual capacity only and *not* in any
24 representative capacity), and on behalf of his/its past and current agents, representatives, counsel,
25 successors, and/or assignees, expressly waive and relinquish any and all rights and benefits that they
26 may have under, or that may be conferred upon them by, the provisions of Civil Code section 1542 as
27 well as under any other state or federal statute or common law principle of similar effect, to the
28 fullest extent he/it may lawfully waive such rights or benefits pertaining to the released matters, as
specifically defined by Sections 4.2 and 4.3, above.

1 **5. ENFORCEMENT OF CONSENT JUDGMENT**

2 Only the Parties may enforce this Consent Judgment. Any Party may enforce the terms and
3 conditions contained in this Consent Judgment, provided that such Party complies with the terms and
4 conditions set forth in this Section 5. The prevailing party shall be entitled to its reasonable
5 attorneys' fees and costs associated with such enforcement.

6 No application, motion, or action to enforce this Consent Judgment may be filed, commenced
7 or maintained, and no 60-day notice related to the Products may be served unless (i) the Party seeking
8 enforcement first notifies the other Party of the specific act(s) alleged to breach this Consent
9 Judgment, and (ii) the entity receiving a notice of alleged breach fails to comply with the
10 requirements set forth in this Section.

11 Any notice of breach to A & E must: (i) identify the Product by item, model number, brand
12 name, or SKU (stock keeping unit), as applicable; (ii) specify all known dates when the Product was
13 sold, offered for sale, or purchased in California; (iii) identify the store or other seller offering the
14 Product for sale to consumers in California; and (iv) include any additional evidence or information
15 supporting the alleged breach or violation as is available.

16 Within 30 days of receiving written notice from Brimer alleging a breach of this Consent
17 Judgment, A & E, at its own election shall either (i) send the entity offering the Product for sale in or
18 into California a letter directing that the Product be promptly removed from inventory and returned to
19 A & E at A & E's expense, (ii) provide the entity offering the Product for sale in or into California
20 with warning materials in compliance with Section 2.3 and, thereafter, verify with the entity that such
21 warnings have been, or are being, provided, or (iii) refute the alleged breach during the meet and
22 confer period to Brimer's satisfaction. Such actions taken by A & E shall be considered a cure of the
23 alleged breach, and Brimer may take no further action to alleged breach or violation of this Consent
24 Judgment. Should the Parties be unable to resolve the dispute after meeting and conferring for not
25 less than 45 days following Brimer's service of a notice of breach in compliance with this Section, he
26 may pursue formal enforcement of this Consent Judgment.

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6. **COURT APPROVAL**

This Consent Judgment is not effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved and entered by the Court within one year after it has been fully executed by the Parties, or within such additional time to which the Parties may agree in writing.

7. **SEVERABILITY**

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

8. **GOVERNING LAW**

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

9. **NOTICE**

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

For A & E:

John W. Lang
A & E Incorporated
5501 21st Street
Racine, WI 53406

With a copy to:

J.T. Wells Blaxter, Esq.
Blaxter | Blackman LLP
475 Sansome Street, Suite 1850
San Francisco, CA 94111

1 For Brimer:

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

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

9 **10. COUNTERPARTS; FACSIMILE/EMAIL SIGNATURES**

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

13 **11. POST EXECUTION ACTIVITIES**

14 Brimer agrees to comply with the reporting form requirements referenced in Health and
15 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
16 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of this Consent
17 Judgment, which Brimer shall draft and file. In furtherance of obtaining such approval, the Parties
18 agree to mutually employ their best efforts and those of their counsel to support the entry of this
19 agreement as judgment, and to obtain judicial approval of the settlement in a timely manner. For
20 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for
21 approval, responding to any opposition or objection any third-party may file, and appearing at the
22 hearing, if so requested.

23 **12. MODIFICATION**

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

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1 **13. AUTHORIZATION**

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

4 **AGREED TO:**

AGREED TO:

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6 Date: 1/9/2018

Date: 12/14/17

7 By:  _____

By:  _____

8 RUSSELL BRIMER

John W. Lang
A & E INCORPORATED

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