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10 RUSSELL BRIMER

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN FRANCISCO
14 UNLIMITED CIVIL JURISDICTION
15

16 RUSSELL BRIMER
17
18 Plaintiffs,
19
20 v.
21
22 DIGITAL GADGETS, LLC; *et al.*,
23
24 Defendants.

Case No. CGC-15-546424
**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT DIGITAL GADGETS,
LLC.**
(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 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 Digital Gadgets, LLC (“Digital Gadgets”), with Brimer and Digital Gadgets each
5 referred to individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Brimer is a resident of the State of California who seeks to promote awareness of exposures
8 to toxic chemicals, and to improve human health by reducing or eliminating harmful substances
9 contained in consumer and commercial products.

10 **1.3 Defendant**

11 Digital Gadgets employs ten or more persons and is a person in the course of doing business
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that Digital Gadgets manufactures, imports, sells, and/or distributes for sale
16 in California, tablet computer stands/supports that contain Lead without providing the health hazard
17 warning required by Proposition 65. Lead is listed pursuant to Proposition 65 as a chemical that is
18 known to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are tablet computer stands/supports
21 containing Lead that are sold or distributed for sale in California by Digital Gadgets including, but
22 not limited to, the *DG Accessory Collection iCozy Bean Bag, DGIPA3BB-RD, #182 810097325 7*
23 *024, UPC #8 86004 02212 1* (collectively, “Products”).

24 **1.6 Notices of Violation**

25 On March 31, 2015, Brimer served Digital Gadgets and the requisite public enforcement
26 agencies with a 60-Day Notice of Violation (“Notice”), alleging that Digital Gadgets violated
27 Proposition 65 when it failed to warn its customers and consumers in California of the health
28 hazards associated with exposures to Lead in the Products. To the best of the Parties’ knowledge,

1 no public enforcer has commenced and is diligently prosecuting an action to enforce the allegations
2 set forth in the Notice.

3 **1.7 Complaint**

4 On June 17, 2015, Brimer commenced the instant action (“Complaint”), naming Digital
5 Gadgets as a defendant for the alleged violations of Proposition 65 that are the subject of the
6 Notice.

7 **1.8 No Admission**

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

17 **1.9 Jurisdiction**

18 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
19 jurisdiction over Digital Gadgets as to the allegations in the Complaint, that venue is proper in San
20 Francisco County, and that the Court has jurisdiction to enter and enforce the provisions of this
21 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that
24 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

25 **2. INJUNCTIVE SETTLEMENT TERMS**

26 **2.1 Commitment to Reformulate or Warn**

27 Commencing on the Effective Date, and continuing thereafter, Digital Gadgets shall only
28 sell, purchase for sale, or distribute for sale in California, (a) Reformulated Products, (b) or

1 Products sold with a Clear and Reasonable Warning pursuant to Section 2.3

2 **2.2 Reformulated Products**

3 For purposes of this Consent Judgment, “Reformulated Products” are Products containing a
4 maximum of 100 parts per million of Lead by weight in any accessible component (i.e., any
5 component that can be touched or handled during a reasonably foreseeable use) when analyzed
6 pursuant to Environmental Protection Agency testing methodologies 3050B and/or 6010B, and that
7 yield a result of less than 1.0 micrograms of Lead when analyzed pursuant to the NIOSH 9100
8 testing protocol.

9 **2.3 Clear and Reasonable Warnings**

10 Commencing on the Effective Date and continuing thereafter, for all Products that are not
11 Reformulated Products (i.e. Products that contain more than 100 ppm Lead), Digital Gadgets agrees
12 that it will only ship, sell, or offer such Products for sale in California with a clear and reasonable
13 warning utilized pursuant to this Section. Digital Gadgets further agrees that the warning will be
14 prominently placed with such conspicuousness as compared with other words, statements, designs,
15 or devices as to render it likely to be read and understood by an ordinary individual under
16 customary conditions before purchase or use. For purposes of this Consent Judgment, a clear and
17 reasonable warning shall consist of a warning affixed to the packaging, label, tag, or directly to a
18 Product sold in California containing one of the following statements:

19
20 **WARNING:** This product contains Lead, a
21 chemical known to the State of California
22 to cause cancer and birth defects and other
23 reproductive harm.

24 or

25 **WARNING:** This product contains a
26 chemical known to the State of California to
27 cause cancer and birth defects or other
28 reproductive harm.

29 **2.3 Grace Period for Existing Inventory**

30 Digital Gadgets represents that it currently provides a warning for the Products that
31 reads: “WARNING: This product contains a chemical known to the State of California to cause

1 cancer or birth defects or other reproductive harm.” Brimer agrees that Digital Gadgets may
2 continue to sell Products bearing this warning for 180 days after the Effective Date, or until it has
3 exhausted its supply of Products and/or warnings bearing this statement.

4 **3. MONETARY SETTLEMENT TERMS**

5 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

6 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
7 claims referred to in this Consent Judgment, Digital Gadgets shall pay \$10,000 in civil penalties in
8 accordance with this Section. Each penalty payment will be allocated in accordance with California
9 Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California
10 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
11 penalty remitted to Brimer. Brimer’s counsel shall be responsible for delivering OEHHA any
12 penalty payment made under this Consent Judgment.

13 **3.1.1 Initial Civil Penalty.** Within two days of the Effective Date, Digital
14 Gadgets shall make an initial civil penalty payment of \$3,000. Digital Gadgets shall provide its
15 payment in two checks for the following amounts made payable to: (a) “OEHHA” in the amount of
16 \$2,250; and (b) “Russell Brimer, Client Trust Account” in the amount of \$750, to be delivered to
17 the address provided in Section 3.4, below.

18 **3.1.2 Final Civil Penalty.** On December 31, 2016, Digital Gadgets shall make a
19 final civil penalty payment of \$7,000. Pursuant to title 11 California Code of Regulations, section
20 3203(c), Brimer agrees that the final civil penalty payment shall be waived in its entirety if, no later
21 than December 1, 2016, an officer of Digital Gadgets provides Brimer with a signed declaration
22 certifying that all of the Products it ships for sale or distributes for sale in California as of the date
23 of its certification are Reformulated Products, and that Digital Gadgets will continue to offer only
24 Reformulated Products in California in the future. Alternatively, Digital Gadgets may certify that is
25 not presently offering the Products for sale in California but, that should it recommence sales in the
26 future, it will only offer Reformulated Products. The option to provide a declaration in lieu of
27 making the final civil penalty payment otherwise required by this Section is a material term, and
28 time is of the essence.

1 **3.2 Reimbursement of Attorneys' Fees and Costs**

2 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
3 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
4 to be resolved after the material terms of the agreement had been settled. After finalizing the other
5 settlement terms the Parties then negotiated a resolution of the compensation due to Brimer and his
6 counsel under general contract principles and the private attorney general doctrine codified at
7 California Code of Civil Procedure § 1021.5. For all work performed through the mutual
8 execution of this agreement and the Court's approval of the same, but exclusive of fees and costs
9 on appeal, if any, Digital Gadgets shall reimburse Brimer and his counsel \$30,000 to be delivered
10 in three (3) installments according to the following schedule: (1) \$10,000 due on or before June 15,
11 2016; (2) \$10,000 due on or before July 15, 2016; and (3) \$10,000 due on or before August 15,
12 2016. Digital Gadgets' payments shall be in the form of a check payable to "The Chanler Group."
13 The reimbursement covers all fees and costs incurred by Brimer investigating, bringing this matter
14 to Digital Gadgets' attention, litigating, negotiating a settlement of the matter in the public interest,
15 and obtaining court approval of the same.

16 **3.3 Payments Held In Trust**

17 With the exception of the final civil penalty payment required by Section 3.1.2, any
18 payment that becomes due under this Consent Judgment prior to the Court's approval of the Parties'
19 settlement shall be tendered on the date it is due, and held in trust by Digital Gadgets' counsel until,
20 and disbursed to Brimer within two days after, the Effective Date. Digital Gadgets' counsel shall
21 confirm receipt of each settlement payment received in writing to Brimer's counsel. Any payment
22 that becomes due after the Effective Date, shall be delivered directly to Brimer's counsel at the
23 address in Section 3.4.

24 **3.4 Payment Address**

25 All payments required by this Consent Judgment shall be delivered to:

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

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Brimer’s Release of Proposition 65 Claims**

3 Brimer, acting on his own behalf and in the public interest, releases Digital Gadgets and its
4 parents, subsidiaries, affiliated entities under common ownership directors, officers, employees, and
5 attorneys (“Releasees”) and each entity to whom Digital Gadgets directly or indirectly distributes or
6 sells the Products including, but not limited to, its downstream distributors, wholesalers, customers,
7 retailers, including but not limited to Big Lots Inc. and Big Lots Stores, Inc., franchisers,
8 cooperative members, licensors and licensees (“Downstream Releasees”) for any violations arising
9 under Proposition 65 for unwarned exposures to Lead from the Products manufactured, imported,
10 distributed or sold by Digital Gadgets prior to the Effective Date, as set forth in the Notice.

11 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 by
12 Digital Gadgets with respect to exposures to Lead from Products manufactured, sold or distributed
13 for sale by Digital Gadgets after the Effective Date.

14 **4.2 Brimer’s Individual Release of Claims**

15 Brimer, in his individual capacity only and *not* in his representative capacity, also provides a
16 release to Defendants, Releasees, and Downstream Releasees which shall be effective as a full and
17 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
18 attorneys’ fees, damages, losses, claims, liabilities and demands of Brimer of any nature, character
19 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
20 exposures to Lead in Products manufactured, imported, distributed or sold by Digital Gadgets
21 before the Effective Date.

22 **4.3 Digital Gadgets’ Release of Brimer**

23 Digital Gadgets, on its own behalf and on behalf of its past and current agents,
24 representatives, attorneys, successors and/or assignees, hereby waives any and all claims against
25 Brimer and his attorneys and other representatives for any and all actions taken or statements made
26 by Brimer and his attorneys and other representatives in the course of investigating claims, seeking
27 to enforce Proposition 65 against it in this matter, or with respect to the Products.
28

1 **5. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court and
3 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
4 after it has been fully executed by all Parties. Brimer and Digital Gadgets agree to support the entry
5 of this agreement as a judgment, and to obtain the Court’s approval of their settlement in a timely
6 manner. The Parties acknowledge that, pursuant to California Health and Safety Code section
7 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which
8 motion Brimer shall draft and file and Digital Gadgets shall support, appearing at the hearing if so
9 requested. If any third-party objection to the motion is filed, Brimer and Digital Gadgets agree to
10 work together to file a reply and appear at any hearing. This provision is a material component of
11 the Consent Judgment and shall be treated as such in the event of a breach.

12 **6. DISMISSAL OF BIG LOTS ENTITIES**

13 Within 10 days of the Effective Date, or Brimer’s receipt of Digital Gadget’s settlement
14 funds, whichever is later, Brimer will file a request for dismissal as to defendants Big Lots, Inc. and
15 Big Lots Stores, Inc.

16 **7. SEVERABILITY**

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

20 **8. GOVERNING LAW**

21 The terms of this Consent Judgment shall be governed by the laws of the State of California
22 and apply within the State of California. In the event that Proposition 65 is repealed, pre-empted, or
23 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Digital
24 Gadgets may provide Brimer with written notice of any asserted change in the law, and shall have
25 no further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
26 Products are so affected.

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1 **9. NOTICE**

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

6

7

For Digital Gadgets:

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Paul Goldenberg, President
Digital Gadgets, LLC
21 Englehard Drive
Monroe Township, NJ 08831

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11

with a copy to:

12

Ken Keller, Esq.
Keller Sloan Roman Holland LLP
555 Montgomery Street, 17th Floor
San Francisco, CA 94111

13

14

15

For Brimer:

16

The Chanler Group
Attn: Prop 65 Controller
2650 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

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

22 **10. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

26 **11. COMPLIANCE WITH REPORTING REQUIREMENTS**

27 Brimer and his counsel agree to comply with the reporting form requirements referenced in
28 California Health and Safety Code section 25249.7(f).

1 **12. MODIFICATION**

2 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
3 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion or
4 application of any party and the entry of a modified Consent Judgment by the Court thereon.

5 **13. AUTHORIZATION**

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

9
10 **AGREED TO:**

AGREED TO:

11 Date: 5/19/2016 _____

Date: _____

12
13 By:  _____
14 RUSSELL BRIMER

By: _____
[signature]

Its: _____
[title]

DIGITAL GADGETS, LLC

1 **12. MODIFICATION**

2 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
3 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion or
4 application of any party and the entry of a modified Consent Judgment by the Court thereon.

5 **13. AUTHORIZATION**

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


9
10 **AGREED TO:**

11 Date: _____

12
13 By: _____
14 RUSSELL BRIMER

AGREED TO:

11 Date: 5/26/2016

12
13 By: 
14 [signature]
15 Charles Tebele
16 [print name]

17 Its: President
18 [title]

DIGITAL GADGETS, LLC

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