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RUSSELL BRIMER

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

RUSSELL BRIMER,
Plaintiff,
v.
FAM, LLC; *et al.*,
Defendants.

Case No. 16CV294024
[PROPOSED] CONSENT JUDGMENT
(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Plaintiff”)
4 and FAM, LLC, (“Defendant”) with Plaintiff and FAM each individually referred to as a “Party” and
5 collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Plaintiff alleges that Defendant manufactures, imports, sells, or distributes for sale in
16 California, vinyl/PVC exercise balls that contain di(2-ethylhexyl)phthalate (“DEHP”) without first
17 providing the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition
18 65 as a chemical known to the State of California to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are vinyl/PVC exercise balls containing
21 DEHP that are manufactured, imported, sold, or distributed for sale in California by Defendant
22 including, but not limited to, *The Balance Collection Core Ball Raspberry, B1801-01*, hereinafter the
23 “Products”.

24 **1.6 Notice of Violation**

25 On or about January 29, 2016, Plaintiff served Defendant, and certain requisite public
26 enforcement agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Defendant
27 violated Proposition 65 by failing to warn its customers and consumers in California that the Products
28

1 expose users to DEHP. To the best of the Parties' knowledge, no public enforcer has commenced and
2 is diligently prosecuting the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On April 18, 2016, Plaintiff filed the instant action ("Complaint") naming Defendant as a
5 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of
6 the Notice.

7 **1.8 No Admission**

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

16 **1.9 Jurisdiction**

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

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" means the date on which
23 the Motion to Approve the Consent Judgment is granted by the Court.

24 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

25 Commencing on the Effective Date, and continuing thereafter, Defendant agrees to only
26 manufacture for sale or purchase for sale in California: (a) "Reformulated Products" or (b) Products
27 that are affixed with the appropriate warning labels pursuant to Section 2.2 below. For purposes of
28 this Consent Judgment, "Reformulated Products" are Products containing DEHP in concentrations of

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

4 **2.2 Product Warnings**

5 Defendant agrees that as of the Effective Date, all Products it sells and/or distributes for sale
6 in California which do not qualify as Reformulated Products, will bear a clear and reasonable
7 warning pursuant to this Section. Defendant further agrees that the warning will be prominently
8 placed with such conspicuousness when compared with other words, statements, designs, or devices
9 as to render it likely to be read and understood by an ordinary individual under customary conditions
10 of use. For purposes of this Consent Judgment, a clear and reasonable warning for the Products shall
11 consist of a warning affixed to the packaging, label, tag, or directly to a Products sold in California
12 and containing the following statement:

13 **WARNING:**
14 This product contains DEHP, a chemical
15 known to the State of California to cause birth
16 defects or other reproductive harm.

17 In the event that Defendant sells non-Reformulated Products via its internet website to
18 customers located in California, the warning shall appear either: (a) on the same web page on which a
19 non-Reformulated Product is displayed and/or described; (b) on the same page as the price for the
20 non-Reformulated Product; or (c) on one or more web pages displayed to a purchaser during the
21 checkout process. Alternatively, a symbol may appear adjacent to or immediately following the
22 display, description, price, or checkout listing of the non-Reformulated Product, provided that the
23 warning statement also appears elsewhere on the same web page.

24 Defendant shall have a policy of providing a full refund of the retail price actually paid, plus
25 reasonable shipping costs, to any consumer who presents to Defendant a reasonably documented
26 claim that: (a) the consumer purchased a non-Reformulated Product from a third party via mail order
27 catalogue or internet website which did not display the warning at the time of purchase; (b) the
28 consumer elected to return the non-Reformulated Product to Defendant upon reading the warning on
the package due to concern about exposure to a harmful substance; (c) the consumer did not open the
package or use the product, and is returning it to Defendant in new, saleable condition; and (d) the

1 consumer returned the non-Reformulated Product to Defendant within 30 days of purchase. The
2 policy may provide that the consumer must present reasonable documentation of the actual purchase
3 price paid and the actual cost of shipping in order to receive a refund.

4 **3. MONETARY SETTLEMENT TERMS**

5 **3.1 Civil Penalty Payments**

6 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
7 this Consent Judgment, Defendants shall pay \$4000 in civil penalties to "Russell Brimer, Client Trust
8 Account." The civil penalty payment shall be allocated according to Health and Safety Code section
9 25249.12(c)(1) and (d), with seventy-five percent (75%) of the funds paid to the California Office of
10 Environmental Health Hazard Assessment ("OEHHA") by Brimer, and twenty-five percent (25%) of
11 the funds remitted to Brimer. Civil penalties are to be paid as follows:

12 (i) a check payable to "OEHHA" in the amount of \$3000;

13 (ii) a check payable to "Russell Brimer, Client Trust Account" in the amount of
14 \$1000.

15 **3.2 Reimbursement of Attorney's Fees and Costs**

16 The parties acknowledge that Plaintiff 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 the issue to
18 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
19 other settlement terms had been finalized, Defendant expressed a desire to resolve Plaintiff's fees and
20 costs. The Parties then attempted to (and did) reach an accord on the compensation due to Plaintiff
21 and his counsel under general contract principles and the private attorney general doctrine codified at
22 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
23 execution of this Consent Judgment. Defendant shall pay \$22,500 for the fees and costs incurred by
24 Plaintiff investigating, bringing this matter to Defendant's attention, litigating and negotiating a
25 settlement in the public interest.

26 **3.3 Payments Held in Trust**

27 All payments due under this Consent Judgment shall be held in trust until such time as the
28 Court approves the Parties' settlement. All payments due under this agreement shall be delivered

1 within ten (10) days of execution of the Consent Judgment by all Parties, and held in trust by
2 Defendant's counsel until the Court grants the motion for approval of this Consent Judgment
3 contemplated by Section 5. Within two business days of the Effective Date, Defendant's counsel
4 shall tender the initial civil penalty payments and attorneys' fee and costs reimbursements required
5 by Sections 3.1 and 3.2.

6 **3.4 Payment Address**

7 All payments required by this Consent Judgment shall be delivered to the following
8 address:

9 The Chanler Group
10 Attn: Proposition 65 Controller
11 2560 Ninth Street
12 Parker Plaza, Suite 214
13 Berkeley, CA 94710

14 **4. CLAIMS COVERED AND RELEASED**

15 **4.1 Plaintiff's Public Release of Proposition 65 Claims**

16 Plaintiff, acting on his own behalf and in the public interest, releases the Defendant and its
17 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
18 and attorneys ("Releasees") and each entity to whom it directly or indirectly distributes or sells the
19 Products including, but not limited to, its downstream distributors, wholesalers, customers, retailers,
20 franchisers, cooperative members, licensors and licensees ("Downstream Releasees") for any
21 violations arising under Proposition 65 for unwarned exposures DEHP from Products sold by
22 Defendant prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this
23 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to failures
24 to warn about DEHP from the Products sold by Defendant before the Effective Date, as set forth in
25 the Notice.

26 **4.2 Plaintiff's Individual Release of Claims**

27 Plaintiff, in his individual capacity only and *not* in his representative capacity, also provides a
28 release to Defendant, Releasees, and Downstream Releasees which shall be effective as a full and
final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
attorneys' fees, damages, losses, claims, liabilities and demands of Plaintiff of any nature, character

1 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
2 exposures to DEHP in the Products sold or distributed for sale by Defendant before the Effective
3 Date.

4 **4.3 Defendant's Release of Plaintiff**

5 Defendants, on their own behalf, and on behalf of their past and current agents,
6 representatives, attorneys, successors, and assignees, hereby waives any and all claims against
7 Plaintiff and his attorneys and other representatives, for any and all actions taken or statements
8 made by Plaintiff and his attorneys and other representatives, whether in the course of investigating
9 claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the
10 Products.

11 **5. COURT APPROVAL**

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

15 **6. SEVERABILITY**

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

19 **7. GOVERNING LAW**

20 The terms of this Consent Judgment shall be governed by the laws of the state of California
21 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
22 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Defendant
23 may provide written notice to Plaintiff of any asserted change in the law, and shall have no further
24 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
25 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Defendant
26 from any obligation to comply with any pertinent state or federal toxics control laws.

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1 **8. 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 the following addresses:

5 **FAM, LLC**

6 Frank Zarabi, President
7 FAM, LLC
8 5553 Bandini Boulevard, Suite B
9 Bell, CA 90201

Nathan D. Meyer, Esq.
Russ August & Kabat
12424 Wilshire Boulevard, 12th Floor
Los Angeles, California 90025

8 **Plaintiff**

9 Proposition 65 Coordinator
10 The Chanler Group
11 2560 Ninth Street
12 Parker Plaza, Suite 214
13 Berkeley, CA 94710-2565

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

14 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

18 **10. POST EXECUTION ACTIVITIES**

19 Plaintiff agrees to comply with the reporting form requirements referenced in Health and
20 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
21 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
22 furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, and
23 those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial
24 approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall
25 include, at a minimum, cooperating on the drafting and filing of the necessary moving papers,
26 supporting the motion, and appearing at the hearing before the Court.

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1 **11. MODIFICATION**

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

5 **12. AUTHORIZATION**

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

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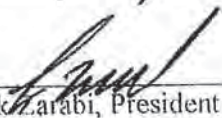
AGREED TO:

Date: 6/24/2016

By: 
Russell Brimer

AGREED TO:

Date: 6/24/16

By: 
Frank Zarabi, President
FAM, LLC