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13 KENCOVE FARM FENCE, INC. AND POWERFIELDS

14  
15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
16 COUNTY OF SAN FRANCISCO  
17 UNLIMITED CIVIL JURISDICTION  
18

19 RUSSELL BRIMER,

20 Plaintiff,

21 v.

22 KENCOVE FARM FENCE, INC., *et al.*,

23 Defendants.  
24

Case No. CGC-18-565315

**[PROPOSED] CONSENT JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.* and  
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 defendants Kencove Farm Fence, Inc. and Powerfields, (collectively, “Kencove”), with Brimer  
5 and Kencove each individually referred to 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            Kencove employs ten or more individuals and is a “person in the course of doing business”  
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety  
13 Code section 25249.6 *et seq.* (“Proposition 65”).

14            **1.4 General Allegations**

15            Brimer alleges that Kencove imports, sells, or distributes for sale in California, tool grips that  
16 contain di(2-ethylhexyl)phthalate (“DEHP”) without first providing the exposure warning required by  
17 Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to cause birth defects  
18 or other reproductive harm.

19            **1.5 Product Description**

20            The products covered by this Consent Judgment are tool grips including, but not limited to,  
21 the *Powerfields Essentials High-Tensile Wire Cutters, #P-HTC, UPC #6 36166 21250 8*, the  
22 *Powerfields Electric Fence Digital Fence Tester, #P-29, UPC #6 36166 22600 0*, and the *Powerfields*  
23 *Heavy-Duty Gate Handle, #P-GHD, UPC #6 36166 26850 5*, that are manufactured, imported,  
24 distributed, sold and/or offered for sale in California by Kencove (“Noticed Products”) as well as  
25 “Additional Products” defined as the *Powerfields Alligator Clamp Power Connectors, #P-APC-1,*  
26 *UPC #6 36166 23460 9*, and the *Powerfields Energizer Output Leads, #PF-EOL-1, UPC #6 36166*  
27 *23950 5*. Noticed Products and Additional Products are collectively referred to herein as “Products.”

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**1.6 Notice of Violation**

On January 17, 2018, Brimer served Kencove, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”) alleging that Kencove violated Proposition 65 by failing to warn its customers and consumers in California of the health hazards associated with exposures to DEHP from the Products. No public enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice.

**1.7 Complaint**

On March 27, 2018, Brimer filed the instant action (“Complaint”), naming Kencove as a defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of the Notice.

**1.8 No Admission**

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

**1.9 Jurisdiction**

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

**1.10 Effective Date**

For purposes of this Consent Judgment, the term “Effective Date” means the date on which the Court approves this Consent Judgment, including any unopposed tentative ruling granting approval of this Consent Judgment.

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1 **2. INJUNCTIVE RELIEF: PRODUCT REFORMULATION AND WARNINGS**

2 **2.1 Commitment to Reformulate or Warn**

3 Commencing on the Effective Date and continuing thereafter, Kencove agrees to only  
4 manufacture, import, distribute, sell or offer for sale in California, Products that are either (a)  
5 Reformulated Products as defined by Section 2.2, below, or (b) Products that bear a clear and  
6 reasonable health hazard warning pursuant to Section 2.3 below.


7 **2.2 Reformulation Standard**

8 For the purposes of this Consent Judgment, "Reformulated Products" are defined as Products  
9 that contain DEHP in concentrations that do not exceed 1,000 parts per million (0.1%) when analyzed  
10 pursuant to U.S. Environmental Protection Agency ("EPA") testing methodologies 3580A and 8270C  
11 or equivalent methodologies utilized by state or federal agencies for the purpose of determining  
12 DEHP content in a solid substance.

13 **2.3 Clear and Reasonable Warnings**

14 Commencing on the Effective Date and continuing thereafter, for any Products sold or  
15 distributed for sale in California by Kencove that are not Reformulated Products, Kencove agrees to  
16 only sell or distribute such Products for sale in California with a clear and reasonable warning in  
17 accordance with this Section or Title 27 California Code of Regulations section 25602 and 25603.  
18 Kencove further agrees that any warning used will be prominently placed in relation to the Products  
19 with such conspicuousness when compared with other words, statements, designs, or devices as to  
20 render it likely to be read and understood by an ordinary individual under customary conditions of  
21 purchase or use. For purposes of this Consent Judgment, a warning satisfying the above criteria that  
22 is affixed directly to a Product or its accompanying labeling or packaging containing the following  
23 statement shall be deemed clear:

24 (a) **Warning.** The Warning shall consist of the following statement:

25  **WARNING:** This product can expose you to chemicals  
26 including DEHP, which is known to the  
27 State of California to cause birth defects  
28 or other reproductive harm. For more  
information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

1 (b) **Alternative Short-Form Warning.** Kencove may, but is not required to, use  
2 the alternative short-form warning as set forth in this subsection 2.3(b) (“Alternative Short-Form  
3 Warning”), as follows:

4 **⚠ WARNING: Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).**

5 The Alternative Short-Form Warning must be in a type size no smaller than the largest type size used  
6 for consumer information (as defined in section 25600.1(c)) on the Product or Product label, and in  
7 no case smaller than 6-point type.

### 8 **3. MONETARY SETTLEMENT TERMS**

#### 9 **3.1 Civil Penalty Payments**

10 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all the claims  
11 referred to in the Notice, Complaint, and this Consent Judgment, Kencove shall pay \$3,000 in civil  
12 penalties. The civil penalty payment shall be allocated according to Health and Safety Code section  
13 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office  
14 of Environmental Health Hazard Assessment (“OEHHA”), and the remaining twenty-five percent  
15 (25%) of the penalty retained by Brimer. Brimer’s counsel shall be responsible for delivering  
16 OEHHA’s portion of any penalty payment(s) made under this Consent Judgment. Kencove shall  
17 provide its payment in a check made payable to “Russell Brimer, Client Trust Account” in the  
18 amount of \$750 and a check made payable to “OEHHA” in the amount of \$2,250 to be delivered to  
19 the address provided in Section 3.3, below.

#### 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 to them, thereby leaving the issue to  
23 be resolved after 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, and court approval of the same, but exclusive of fees and costs  
28 on appeal, if any. Under these legal principles, Kencove shall pay \$26,000 for all fees and costs

1 incurred by Brimer investigating, bringing this matter to Kencove's attention, litigating and  
2 negotiating a settlement in the public interest. Kencove's payment shall be delivered to the address in  
3 Section 3.4 in a check payable to "The Chanler Group."

### 4 **3.3 Payment Timing; Payments Held in Trust**

5 All payments due under this Consent Judgment shall be held in trust until such time as the  
6 Court approves the Parties' settlement. Within fourteen (14) days of the date that this Consent  
7 Judgment is fully executed by the Parties, all payments due under this agreement shall be delivered  
8 to Kencove's counsel and held in trust until the Effective Date. Kencove's counsel shall provide  
9 Brimer's counsel with written confirmation upon its receipt of the settlement payments. Within five  
10 days of the Effective Date, Kencove's counsel shall deliver the civil penalty and attorneys' fee  
11 reimbursement payments to Brimer's counsel.

### 12 **3.4 Payment Address**

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

14 The Chanler Group  
15 Attn: Proposition 65 Controller  
16 2560 Ninth Street  
Parker Plaza, Suite 214  
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, Brimer releases Kencove and its  
20 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,  
21 and attorneys ("Releasees"), and each entity to whom Kencove directly or indirectly distributes or  
22 sells the Products including, without limitation, its downstream customers, distributors, wholesalers,  
23 and retailers ("Downstream Releasees") for any violation arising under Proposition 65 pertaining to  
24 the failure to warn about exposures to DEHP from Noticed Products sold or distributed for sale by  
25 Kencove prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this  
26 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP  
27 from Noticed Products sold or distributed for sale by Kencove after the Effective Date.

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

2           Brimer, in his individual capacity only and *not* in any representative capacity, also provides a  
3 release to Kencove, Releasees, and Downstream Releasees, which 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 sold or distributed for sale by Kencove before the Effective Date.

8           **4.3     Kencove’s Release of Brimer**

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

14       **5.     COURT APPROVAL**

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

18       **6.     SEVERABILITY**

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

22       **7.     GOVERNING LAW**

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

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 For Kencove:

6             Don Kendall, President  
7             Kencove Farm Fence, Inc.  
8             344 Kendall Road  
9             Blairsville, PA 15717

10            with a copy to:

11            Timothy G. Hewitt, Esq.  
12            215 Chestnut Street  
13            Latrobe PA, 15650

14            Michael J. Gleason  
15            Hahn Loeser & Parks LLP  
16            One America Plaza  
17            600 West Broadway, Suite 1500  
18            San Diego, CA 92101

19 For Brimer:

20            Proposition 65 Coordinator  
21            The Chanler Group  
22            2560 Ninth Street  
23            Parker Plaza, Suite 214  
24            Berkeley, CA 94710-2565

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

27     **9.     COUNTERPARTS; FACSIMILE SIGNATURES**

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

1     **10.    POST EXECUTION ACTIVITIES**

2             Brimer agrees to comply with the reporting form requirements referenced in Health and  
3 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety  
4 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,  
5 which motion Brimer shall draft and file. In furtherance of obtaining such approval, the Parties agree



1 to mutually employ their best efforts, and those of their counsel, to support the entry of this  
2 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For  
3 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for  
4 approval, responding to any objection that any third-party may file or lodge, and appearing at the  
5 hearing before the Court if so requested.

6 **11. MODIFICATION**

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

10 **12. AUTHORIZATION**

11 The undersigned are authorized to execute this Consent Judgment and acknowledge that they  
12 have read, understand, and agree to all of the terms and conditions contained herein.

13

14 **AGREED TO:**

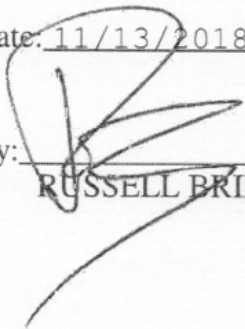
**AGREED TO:**

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16 Date: 11/13/2018

Date: 11/27/2018

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18 By:  \_\_\_\_\_

18 By:  \_\_\_\_\_

19

RUSSELL BRIMER

DON KENDALL, PRESIDENT  
KENCOVE FARM FENCE, INC.

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