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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SANTA CLARA
10 UNLIMITED CIVIL JURISDICTION
11

12 RUSSELL BRIMER,
13 Plaintiff,

14 v.

15 KALTEX NORTH AMERICA, INC.,
16 REVMAN INTERNATIONAL, INC., *et al.*

17 Defendants.
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Case No. 16CV302093

[PROPOSED] CONSENT JUDGMENT

(Cal. 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 (“Brimer”),
4 and defendants Kaltex North America. Inc. and Revman International, Inc. (“Defendants”), with
5 Brimer and Defendants 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 Defendants employ 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 §25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that Defendants manufacture, import, sell, or distribute for sale in California,
16 tumblers with exterior designs that contain lead without providing clear and reasonable warnings
17 under Proposition 65. Lead is listed pursuant to Proposition 65, by the Office of Environmental
18 Health Hazard Assessment (“OEHHA”) as a chemical known to the State of California to cause
19 cancer, birth defects or other reproductive harm.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are certain tumblers with exterior designs
22 containing lead and available for sale in California including, but not limited to, *Laura Ashley*
23 *Eleanora G/C Tumbler, SKU 197052, #1485333, UPC #8 83892 270664*, hereinafter the “Covered
24 Products”.

25 **1.6 Notice of Violation**

26 On or about January 29, 2016, Brimer served Defendants, and certain requisite public
27 enforcement agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Defendants

1 violated Proposition 65 by failing to warn its customers and consumers in California that the Covered
2 Products expose users to lead. To the best of the Parties' knowledge, no public enforcer has
3 commenced and is diligently prosecuting the allegations set forth in the Notice.

4 **1.7 Complaint**

5 On October 31, 2016 Brimer filed the instant action ("Complaint") naming Defendants as
6 defendants for the alleged violations of Health and Safety Code §25249.6 that are the subject of the
7 Notice.

8 **1.8 No Admission**

9 Defendants deny the material, factual, and legal allegations contained in the Notice and
10 Complaint, and maintain that, to the best of their knowledge, based on testing in the normal course of
11 business, its products that are or have been sold and distributed for sale in California, including the
12 Covered Products, have been, and are, in compliance with all laws. Nothing in this Consent
13 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
14 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
15 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
16 not, however, diminish or otherwise affect Defendants' obligations, responsibilities, and duties under
17 this Consent Judgment.

18 **1.9 Jurisdiction**

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

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term "Effective Date" means the date on which
25 Brimer's counsel provides written notice to Defendant's counsel that the Motion to Approve the
26 Consent Judgment has been granted and entered by the Court.

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

2 Commencing sixty (60) days after the Effective Date, and continuing thereafter, Covered
3 Products which the Defendant manufactures for sale in California shall either: (a) be Reformulated
4 Products pursuant to the definition that follows; or (b) have a clear and reasonable warning pursuant
5 to Section 2.2.

6 **2.1 Reformulated Covered Products**

7 “Reformulated Products” are defined as those Covered Products containing a maximum of 90
8 parts per million of lead by weight in any accessible component (i.e., any component that can be
9 touched or handled during reasonably a foreseeable use, such as exterior decorations) when analyzed
10 pursuant to Environmental Protection Agency testing methodologies 3050B and/or 6010B, *and* that
11 yield a result of less than 1.0 micrograms of lead when analyzed pursuant to the NIOSH 9100 testing
12 protocol as applied to exterior decorations of the Covered Products. In addition, Reformulated
13 Products shall yield a result of no detectable lead in the “Lip and Rim Area”, when analyzed
14 according to any test methodology appropriate under Proposition 65. “Lip and Rim Area” is defined
15 as the exterior top 20 millimeters of a Covered Product.

16 **2.2 Product Warnings**

17 Commencing on the Effective Date, Defendants shall provide clear and reasonable warnings
18 for all Covered Products as set forth in subsections 2.2(a) and (b) for all products that do not currently
19 have warnings and that do not qualify as Reformulated Products. Each warning shall be prominently
20 placed with such conspicuousness as compared with other words, statements, designs, or devices as
21 to render it likely to be read and understood by an ordinary individual under customary conditions
22 before use. Each warning shall be provided in a manner such that the consumer or user understands
23 to which *specific* Product the warning applies, so as to minimize the risk of consumer confusion.

24 **(a) Retail Store Sales.**

25 **(i) Covered Product Labeling.** Defendants shall affix a warning to the
26 packaging, labeling, or directly on each Covered Product provided for sale in retail outlets in
27 California that states:

1 **WARNING:** This product contains lead, a chemical
2 known to the State of California to cause
3 birth defects and other reproductive harm.

4 Or,

5 **WARNING:** This product contains a chemical
6 known to the State of California to cause cancer,
7 birth defects and other reproductive harm.

8 Or,

9 **WARNING:** This product can expose you to chemicals including lead, which is
10 known to the State of California to cause cancer, and birth defects or
11 other reproductive harm. For more information, go to
12 www.P65Warnings.ca.gov.

13 Or,

14 **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

15 (ii) **Point-of-Sale Warnings.** Alternatively, Defendants may provide warning
16 signs in the form below to its customers in California with instructions to post the warnings in close
17 proximity to the point of display of the Covered Products. Such instruction sent to Defendants'
18 customers shall be sent by certified mail, return receipt requested.

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

22 Or,

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

26 Or,

27 **WARNING:** This product can expose you to chemicals including lead, which is
28 known to the State of California to cause cancer, and birth defects or
 other reproductive harm. For more information, go to
 www.P65Warnings.ca.gov.

1 Where more than one Product is sold in proximity to other like items or to those that do not
2 require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement
3 shall be used:¹

4 **WARNING:** The following products contain lead, a chemical
5 known to the State of California to cause birth defects
6 and other reproductive harm:

7 *[list products for which warning is required]*

8 Or,

9 **WARNING:** The following products contain a chemical
10 known to the State of California to cause cancer
11 and birth defects and other reproductive harm.

12 *[list products for which warning is required]*

13 Or,

14 **WARNING:** The following products can expose you to chemicals including lead,
15 which is known to the State of California to cause cancer, and birth
16 defects or other reproductive harm. For more information, go to
17 www.P65Warnings.ca.gov.

18 *[list products for which warning is required]*

19 **(b) Mail Order Catalog and Internet Sales.** In the event that Defendants sell Covered
20 Products via mail order catalog and/or the internet, to customers located in California, after the
21 Effective Date, that are not Reformulated Products, Defendants shall provide warnings for such
22 Covered Products sold via mail order catalog or the internet to California residents. Warnings given
23 in the mail order catalog or on the internet shall identify the *specific* Covered Product to which the
24 warning applies as further specified in Sections 2.2(b)(i) and (ii).

25 **(i) Mail Order Catalog Warning.** Any warning provided in a mail order catalog
26 shall be in the same type size or larger than the Covered Product description text within the catalog.
27 The following warning shall be provided on the same page and in the same location as the display

28 ¹For purposes of the Consent Judgment, “sold in proximity” shall mean that the Covered Product and another similar product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

1 and/or description of the Covered Product:

2 **WARNING:** This product contains lead, a chemical
3 known to the State of California to cause
birth defects and other reproductive harm.

4 Or,

5 **WARNING:** This product contains a chemical
6 known to the State of California to cause cancer
and birth defects and other reproductive harm.

7 Or,

8 **WARNING:** This product can expose you to chemicals including lead, which is
9 known to the State of California to cause cancer, and birth defects or
other reproductive harm. For more information, go to
10 www.P65Warnings.ca.gov.

11 Where it is impracticable to provide the warning on the same page and in the same location as
12 the display and/or description of the Covered Product, Defendants may utilize a designated symbol to
13 cross reference the applicable warning and shall define the term “designated symbol” with the
14 following language on the inside of the front cover of the catalog or on the same page as any order
15 form for the Covered Product(s):

16 **WARNING:** Certain products identified with this symbol ▼
17 and offered for sale in this catalog contain lead,
a chemical known to the State of California to cause
birth defects and other reproductive harm.

18 Or,

19 **WARNING:** Certain products identified with this symbol ▼
20 and offered for sale in this catalog contain
a chemical known to the State of California to cause
21 cancer and birth defects and other reproductive harm.

22 Or,

23 **WARNING:** Certain products identified with this symbol ▼
24 and offered for sale in this catalog can expose you to chemicals
including lead, which is known to the State of California to cause
25 cancer, and birth defects or other reproductive harm. For more
information, go to www.P65Warnings.ca.gov.

26 The designated symbol must appear on the same page and in close proximity to the display
27 and/or description of the Covered Product. On each page where the designated symbol appears, 6

1 Defendants must provide a header or footer directing the consumer to the warning language and
2 definition of the designated symbol.

3 (ii) **Internet Website Warning.** A warning shall be given in conjunction with the
4 sale of the Covered Products via the internet, which warning shall appear either: (a) on the same web
5 page on which a Covered Product is displayed; (b) on the same web page as the order form for a
6 Covered Product; (c) on the same page as the price for any Covered Product; or (d) on one or more
7 web pages displayed to a purchaser during the checkout process. The following warning statement
8 shall be used and shall appear in any of the above instances adjacent to or immediately following the
9 display, description, or price of the Product for which it is given in the same type size or larger than
10 the Covered Product description text:

11 **WARNING:** This product contains lead, a chemical
12 known to the State of California to cause
13 birth defects and other reproductive harm.

14 Or,

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

18 Or,

19 **WARNING:** This product can expose you to chemicals including lead, which is
20 known to the State of California to cause cancer, and birth defects or
21 other reproductive harm. For more information, go to
22 www.P65Warnings.ca.gov.

23 Alternatively, the designated symbol may appear adjacent to or immediately following the
24 display, description, or price of the Product for which a warning is being given, provided that the
25 following warning statement also appears elsewhere on the same web page, as follows:

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

Or,

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

1 Or,

2 **WARNING:** This product can expose you to chemicals including lead, which is
3 known to the State of California to cause cancer, and birth defects or
4 other reproductive harm. For more information, go to
5 www.P65Warnings.ca.gov.¹

6 **3. MONETARY SETTLEMENT TERMS**

7 **3.1 Civil Penalty Payments**

8 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
9 the Notice and this Consent Judgment, Defendants shall pay \$2,000 in civil penalties. The civil
10 penalty payment shall be allocated according to Health and Safety Code §25249.12(c)(1) and (d),
11 with seventy-five percent (75%) of the funds paid to the California Office of Environmental Health
12 Hazard Assessment (“OEHHA”) by Brimer, and twenty-five percent (25%) of the funds remitted to
13 Brimer. Defendants shall issue the payment in two checks for the following amounts made payable
14 to: (a) “OEHHA” in the amount of \$1,500; and (b) “Russell Brimer, Client Trust Account” in the
15 amount of \$500.

16 **3.2 Reimbursement of Attorney’s Fees and Costs**

17 The parties acknowledge that Brimer and his counsel offered to resolve this dispute without
18 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
19 be resolved after the material terms of this Consent Judgment had been settled. Defendants agree to
20 pay Brimer’s counsel for an award of attorney fees, inclusive of all expenses and costs
21 incurred as a result of investigating, bringing this matter to Defendants’ attention, litigating and
22 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to
23 Code of Civil Procedure § 1021.5, in an amount of \$20,000.00. Other than the payment
24 required hereunder, each side is to bear its own attorneys’ fees and costs.

25 Defendants shall issue the payment by check made payable to “The Chanler Group.”

26 ² At Defendants’ sole discretion, any warning provided pursuant to section 2.2 of this Consent
27 Judgment may include a symbol consisting of a black exclamation point in a yellow equilateral
28 triangle with a bold black outline or the symbol may be printed in black and white.

1 **3.3 Payments**

2 Defendants shall pay the civil penalty and attorney fees set forth in Sections 3.1 and 3.2
3 of this Consent Judgment within seven days of the Effective Date. In order to expedite the
4 settlement of this claim, scanned copies that have been sent via email of the Motion to Approve
5 the Consent Judgment that has been approved and entered by the Court will suffice as written notice
6 for the purpose of determination of the Effective Date.

7 **3.4 Payment Address**

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

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

14 **4. CLAIMS COVERED AND RELEASED**

15 **4.1 Brimer’s Public Release of Proposition 65 Claims**

16 This Consent Judgment is a full, final, and binding resolution between Brimer, acting
17 on his own behalf and in the public interest, and Defendants and their parents, subsidiaries,
18 affiliated entities under common ownership, directors, officers, employees, and attorneys
19 (“Releasees”) and each entity to whom they directly or indirectly distribute or sell the Covered
20 Products including, but not limited to, their downstream distributors, wholesalers, customers,
21 retailers, franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) for
22 any violations arising under Proposition 65 for unwarned exposures to lead from Covered Products
23 sold by Defendants prior to the Effective Date. Compliance with the terms of this Consent
24 Judgment constitutes compliance with Proposition 65 with regard to the Covered Products.

25 **4.2 Brimer’s Individual Release of Claims**

26 In addition to the foregoing, Brimer, in his individual capacity only and *not* in his
27 representative capacity, also provides a release to Defendants, Releasees, and Downstream Releasees

1 which shall be effective as a full and final accord and satisfaction, as a bar from any and all manners
2 of actions, causes of action, claims, rights, suits, obligations, debts, contracts, agreements, promises,
3 charges, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
4 Defendants of any nature whatsoever, character or kind, whether known or unknown, suspected or
5 unsuspected, in law or equity, fixed or contingent, now or in the future, arising out of alleged or
6 actual exposures to lead in the Covered Products sold or distributed for sale by Defendants before the
7 Effective Date.

8 With respect to the foregoing waivers and releases in this paragraph, the Parties hereby
9 specifically waive any and all rights and benefits which they now have, or in the future may have,
10 conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides
11 as follows:

12 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**
13 **WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO**
14 **EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING**
15 **THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST**
16 **HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT**
17 **WITH THE DEBTOR.**

18 **4.3 Defendants' Release of Brimer**

19 Defendants, on their own behalf, and on behalf of their past and current agents,
20 representatives, attorneys, successors, and assignees, hereby waive any and all claims against Brimer
21 and his attorneys and other representatives, for any and all actions taken or statements made by
22 Brimer's claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect
23 to the Covered Products.

24 **5. COURT APPROVAL**

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

28 **6. INTEGRATION**

This Consent Judgment contains the sole and entire agreement of the Parties and any and all
prior negotiations and understandings related hereto shall be deemed to have been merged within it.

1 No representation or terms of agreement other than those contained herein exist or have been made
2 by any Party with respect to the other Party or the subject matter hereof.

3 **7. SEVERABILITY**

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

7 **8. GOVERNING LAW**

8 The terms of this Consent Judgment shall be governed by the laws of the state of California
9 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
10 otherwise rendered inapplicable by reason of law generally, or as to the Covered Products,
11 then Defendants may provide written notice to Brimer of any asserted change in the law, and shall
12 have no further injunctive obligations pursuant to this Consent Judgment with respect to, and to the
13 extent that, the Covered Products are so affected. Nothing in this Consent Judgment shall be
14 interpreted to relieve Defendants from any obligation to comply with any pertinent state or federal
15 toxics control laws.

16 **9. NOTICE**

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

21 **Defendants**

22 Malcolm Weiss, Esq. and
23 Vidya Venugopal
24 Hunton & Williams LLP
25 550 South Hope Street
26 Suite 2000
27 Los Angeles, CA 90071
28 Mweiss@hunton.com
VVenugopal@hunton.com

Brimer

Proposition 65 Coordinator or
Warren Klein
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Warren@chanler.com

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

3 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

7 **11. POST EXECUTION ACTIVITIES**

8 Brimer agrees to comply with the reporting form requirements referenced in Health and
9 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
10 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
11 furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, and
12 those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial
13 approval of their settlement in a timely manner. For purposes of this Section, “best efforts” shall
14 include, at a minimum, cooperating on the drafting and filing of the necessary moving papers,
15 supporting the motion, and appearing at the hearing before the Court.

16 **12. MODIFICATION**

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

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1 **13. AUTHORIZATION**

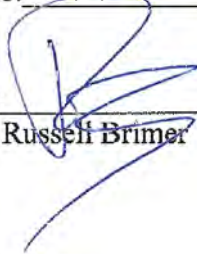
2 The undersigned are authorized to execute this Consent Judgment and have read, understood,
3 and agree to all of the terms and conditions contained herein

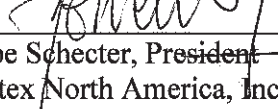
4 **AGREED TO:**

AGREED TO:

5
6 Date: 11/2/2016

Date: 11-2-2016.

7
8 By: 
9 Russell Brimer

By: 
Hebe Schecter, President
Kaltex North America, Inc.

AGREED TO:

10
11 Date: 11/2/16

12
13 By: 
14 Richard Roman, CEO
15 Revman International, Inc.