

1 Clifford Chanler, State Bar No. 135534
2 Chris Tuttle, State Bar No. 264545
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118
9 Email: ctuttle@chanler.com

10 Attorneys for Plaintiff
11 RUSSELL BRIMER

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN FRANCISCO
15 UNLIMITED CIVIL JURISDICTION
16

17 RUSSELL BRIMER,

18 Plaintiff,

19 v.

20 DONNA LOREN LLC, *et al.*,

21 Defendants.
22
23
24
25
26
27
28

Case No. CGC-15-546425

**[PROPOSED] CONSENT JUDGMENT AS
TO TUESDAY MORNING
CORPORATION AND TUESDAY
MORNING, INC.**

(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 defendants Tuesday Morning Corporation and Tuesday Morning, Inc. (collectively, “Tuesday
5 Morning”), with Brimer and Tuesday Morning each referred to individually as a “Party” and
6 collectively as the “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

16 Brimer alleges that Tuesday Morning imports, sells and/or distributes for sale in California,
17 vinyl/PVC earphone cords containing di(2-ethylhexyl)phthalate (“DEHP”), without first providing
18 the health hazard warning that Brimer alleges is required by Proposition 65. DEHP is listed
19 pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects or
20 other reproductive harm.

21 **1.5 Product Description**

22 The products covered by this Consent Judgment are vinyl/PVC earphone cords containing
23 DEHP that are manufactured by, and supplied to Tuesday Morning by Donna Loren LLC, Jump
24 Shot Sportswear Inc., Envision Accessories, LLC, and/or Macnet LLC, including, but not limited
25 to, the cord component of the *Design by Prestigex Wallet Case with Earphones, #1399104, UPC #6*
26 *78091 17259 5* (collectively, “Products”).

27
28

1 **1.6 Notice of Violation**

2 On March 31, 2015, Brimer served Tuesday Morning and the requisite public enforcement
3 agencies with a 60-Day Notice of Violation (“Notice”), alleging that Tuesday Morning violated
4 Proposition 65 when it failed to warn its customers and consumers in California of the health
5 hazards associated with exposures to DEHP from the Products. To the best of the Parties’
6 knowledge, no public enforcer has commenced and is diligently prosecuting an action to enforce
7 the allegations set forth in the Notice.

8 **1.7 Complaint**

9 On June 17, 2015, Brimer commenced the instant action, naming Tuesday Morning, among
10 others, as a defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

11 **1.8 No Admission**

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

21 **1.9 Jurisdiction**

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

27
28

1 **1.10 Effective Date**

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

4 **2. INJUNCTIVE SETTLEMENT TERMS**

5 Commencing on the Effective Date and continuing thereafter, any Products that Tuesday
6 Morning purchases for sale in California shall qualify as Reformulated Products. For purposes of
7 this Consent Judgment, “Reformulated Products” are defined as Products with a maximum DEHP
8 concentration of 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S.
9 Environmental Protection Agency testing methodologies 3580A and 8270C, or other methodologies
10 utilized by state or federal agencies for the purpose of determining DEHP content in a solid
11 substance.

12 **3. MONETARY SETTLEMENT TERMS**

13 **3.1 Civil Penalty Payments**

14 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in this
15 Consent Judgment, Tuesday Morning shall pay \$2,500 in civil penalties. The civil penalty payment
16 will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) &
17 (d), with 75% of the penalty amount remitted to the California Office of Environmental Health
18 Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount paid to Plaintiff.
19 Tuesday Morning shall make its civil penalty payment of \$2,500, in two checks for the following
20 amounts made payable to (a) “OEHHA” in the amount of \$1,875; and (b) “Russell Brimer, Client
21 Trust Account” in the amount of \$625.

22 **3.2 Reimbursement of Attorneys’ Fees and Costs**

23 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
24 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
25 to be resolved after the material terms of the agreement had been settled. Shortly after the other
26 settlement terms had been finalized, Tuesday Morning expressed a desire to resolve Brimer’s fees
27 and costs. The Parties then negotiated a resolution of the compensation due to Brimer and his
28 counsel under general contract principles and the private attorney general doctrine codified at

1 California Code of Civil Procedure § 1021.5. For all work performed through the mutual
2 execution of this agreement and the Court’s approval of the same, but exclusive of fees and costs
3 on appeal, if any, Tuesday Morning shall reimburse Brimer and his counsel \$13,500. Tuesday
4 Morning’s payment shall be delivered to the address in Section 3.4 in the form of a check payable
5 to “The Chanler Group.” The reimbursement shall cover all fees and costs incurred by Brimer
6 investigating, bringing this matter to Tuesday Morning’s attention, litigating, and negotiating a
7 settlement of the matter in the public interest.

8 **3.3 Payment Timing; Payments Held In Trust**

9 Tuesday Morning shall deliver all payments required by this Consent Judgment to its
10 counsel within 15 business days of the date that this agreement is fully executed by the Parties.
11 Tuesday Morning’s counsel shall confirm receipt of settlement funds in writing to Brimer’s
12 counsel and, thereafter, hold the amounts paid in trust until such time as the Court grants the
13 motion for approval of the Parties’ settlement contemplated by Section 5. Within two days of the
14 Effective Date, Tuesday Morning’s counsel shall deliver all settlement payments it has held in trust
15 to Brimer’s counsel at the address provided in Section 3.4.

16 **3.4 Payment Address**

17 All payments required by this Consent Judgment shall be delivered to the following
18 address:

19 The Chanler Group
20 Attn: Proposition 65 Controller
21 2560 Ninth Street
22 Parker Plaza, Suite 214
23 Berkeley, CA 94710

24 **4. CLAIMS COVERED AND RELEASED**

25 **4.1 Brimer’s Release of Proposition 65 Claims**

26 Brimer, acting in the public interest and acting on his own behalf and on behalf of his past
27 and current attorneys, agents, representatives, successors, and assigns, waives all rights to institute
28 or participate in (directly or indirectly) any form of legal action and releases and waives all actions,
causes of action, obligations, costs, expenses, fees (including, but not limited to, attorneys’ fees,
investigation fees, and expert fees), damages, losses, claims, liabilities and demands (collectively,

1 “Claims”) against (a) Tuesday Morning Corporation and Tuesday Morning, Inc., and their parents,
2 subsidiaries, affiliated entities under common ownership, (b) each entity to which any of them
3 directly or indirectly has distributed or sold the Products including, but not limited to, any of their
4 downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members,
5 licensors and licensees, and (c) the current and former directors, officers, owners, shareholders,
6 employees, attorneys, representatives, successors, and assigns of any of the entities listed in
7 sections (a) and (b), above (the entities and individuals identified in (a), (b), and (c), above are
8 collectively referred to as the “Releasees”) with respect to any alleged violations arising under
9 Proposition 65 for unwarned exposures to DEHP from the Products purchased, imported,
10 distributed or sold by Tuesday Morning prior to the Effective Date, as set forth in the Notice. This
11 Consent Judgment is a full, final, and binding resolution as to the Claims referenced in this Section
12 4.1. The Parties agree and understand that the releases provided under this Consent Judgment shall
13 not extend upstream to any entity that manufactured the Products, or any component parts thereof,
14 or that supplied the Products or any component parts thereof to Tuesday Morning. Compliance
15 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
16 exposures to any DEHP in Products purchased, imported, sold or distributed for sale by Tuesday
17 Morning after the Effective Date.

18 **4.2 Brimer’s Individual Release of Claims**

19 Brimer, in his individual capacity only and *not* in his representative capacity, also provides a
20 release on behalf of himself, his past and current agents, representatives, attorneys, successors, and
21 assigns as to all Releasees, which shall be effective as a full and final accord and satisfaction, as a
22 bar to all Claims of any nature, character or kind, whether known or unknown, suspected or
23 unsuspected, arising out of alleged or actual exposures to DEHP in Products purchased, imported,
24 distributed or sold by Tuesday Morning before the Effective Date.

25 **4.3 Tuesday Morning’s Release of Brimer**

26 Tuesday Morning, on its own behalf and on behalf of its past and current agents,
27 representatives, attorneys, successors and assigns, hereby waives any and all claims against Brimer
28 and his attorneys and other representatives, for any and all actions taken or statements made (or

1 those that could have been taken or made) by Brimer and his attorneys and other representatives in
2 the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or
3 with respect to the Products.

4 **4.4 Mutual California Civil Code Section 1542 Waiver**

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

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

10 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,
11 representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and all
12 rights and benefits which they may have under, or which may be conferred upon them by the
13 provisions of Civil Code section 1542 as well as under any other state or federal statute or common
14 law principle of similar effect, to the fullest extent he/it may lawfully waive such rights or benefits
15 pertaining to the released matters, as specifically defined by Sections 4.1 through 4.3, above.

16 **5. COURT APPROVAL**

17 This Consent Judgment is not effective until it is approved and entered by the Court and
18 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
19 after it has been fully executed by the Parties. Brimer and Tuesday Morning agree to support the
20 entry of this agreement as a judgment, and to obtain the Court's approval of their settlement in a
21 timely manner. The Parties acknowledge that, pursuant to California Health and Safety Code
22 section 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment,
23 which motion Brimer shall draft and file and Tuesday Morning shall support, including by
24 appearing at the hearing if so requested. If any third-party objection to the motion is filed, Brimer
25 and Tuesday Morning agree to work together to file a reply and appear at any hearing. This
26 provision is a material component of the Consent Judgment and shall be treated as such in the event
27 of a breach.
28

1 **6. SEVERABILITY**

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

5 **7. GOVERNING LAW**

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

14 **8. NOTICE**

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

| | |
|--|----------------------------------|
| 19 To Tuesday Morning: | To Brimer: |
| 20 Bridgett Zeterberg, General Counsel | Attn: Proposition 65 Coordinator |
| 21 Tuesday Morning Corporation | The Chanler Group |
| 22 6250 LBJ Freeway | 2560 Ninth Street |
| 23 Dallas, TX 75240 | Parker Plaza, Suite 214 |
| | Berkeley, CA 94710-2565 |

23 With a copy to
24 Trenton H. Norris, Esq.
25 Arnold & Porter Kaye Scholer LLP
26 Three Embarcadero Center, 10th Floor
San Francisco, CA 94111

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

1 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

5 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

8 **11. MODIFICATION**

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

12 **12. AUTHORIZATION**

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

16 **AGREED TO:**



17 _____
18 RUSSELL BRIMER.

19 Dated: 6/1/2017

AGREED TO:

TUESDAY MORNING CORPORATION

By: _____
(Print Name)

Its: _____
(Title)

Dated: _____

TUESDAY MORNING, INC.

By: _____
(Print Name)

Its: _____
(Title)

Dated: _____

28

1 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

5 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

8 **11. MODIFICATION**

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

12 **12. AUTHORIZATION**

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

16 **AGREED TO:**

17 _____
18 RUSSELL BRIMER.

19 Dated: _____

AGREED TO:

Rebecca Chutkan
TUESDAY MORNING CORPORATION

By: Rebecca Chutkan
(Print Name)

Its: Senior Corporate Counsel
(Title)

Dated: 5/9/17

Rebecca Chutkan
TUESDAY MORNING, INC.

By: Rebecca Chutkan
(Print Name)

Its: Senior Corporate Counsel
(Title)

Dated: 5/19/17

28