



# CONSENT JUDGMENT

## **1. INTRODUCTION**

### **1.1 Russell Brimer and Petco Animal Supplies, Inc.**

This Consent Judgment is entered into by and between Russell Brimer (“Brimer”), and Petco Animal Supplies, Inc. (“Petco”), with Brimer and Petco collectively referred to as the “Parties.” Brimer is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Brimer is an individual acting in the public interest pursuant to Health and Safety Code section 25249.7(d). Petco employs ten or more persons and is a person in the course of doing business for purposes of Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.5 *et seq.* (“Proposition 65”).

### **1.2 General Allegations**

Brimer alleges that Petco has manufactured, imported, distributed, sold and/or offered for sale in the State of California photo frames containing lead, vinyl/PVC raincoats containing DEHP, and aquarium nets with vinyl/PVC handles containing lead and DEHP without first providing the clear and reasonable warning required by Proposition 65. Lead and DEHP are listed pursuant to Proposition 65 as chemicals known to the state of California to cause birth defects and other reproductive harm.

### **1.3 Product Description**

The products that are covered by this Settlement Agreement are defined as: (1) photo frames containing lead including, but not limited to, *\$1 Deals Photo Frame, SKU# 1389734 (#8 00443 14068 0)*; (2) vinyl/PVC raincoats containing DEHP including, but not limited to, *Petco Raincoat For Dogs, SKU # 1344854 (#8 00443 12211 2)*; and (3) aquarium nets with vinyl/PVC handles containing lead and DEHP including, but not limited to, *Petco Aquarium Net, SKU #1190962 (#8 00443 10611 2)* manufactured, imported, distributed, sold and/or offered for sale by Petco in the state of California, collectively hereinafter the “Products.”

1           **1.4 Notices of Violation**

2           On May 24, 2012, Brimer served Petco and various public enforcement agencies with a  
3 document entitled “60-Day Notice of Violation” (“Notice”) that provided the recipients with notice  
4 that Petco was in violation of California Health & Safety Code § 25249.6 for failing to warn  
5 consumers that its photo frames exposed users in California to lead.

6           On December 20, 2012, Brimer served Petco and various public enforcement agencies with  
7 a document entitled “Supplemental 60-Day Notice of Violation” (“Supplemental Notice”) that  
8 provided the recipients with notice that Petco was in violation of California Health & Safety Code §  
9 25249.6 for failing to warn consumers that its photo frames exposed users in California to lead, its  
10 vinyl/PVC raincoats exposed users in California to DEHP, and its aquarium nets with vinyl/PVC  
11 handles exposed users in California to lead and DEHP. The Notice and Supplemental Notice shall  
12 collectively be referred to hereinafter as the “Notices.” To the best of the Parties’ knowledge, no  
13 public prosecutor has commenced and is diligently prosecuting an action against these violations.

14           **1.5 Complaint**

15           On March 15, 2013, Brimer filed a complaint in the Superior Court in and for the County of  
16 Santa Clara against Petco and Does 1 through 150, *Brimer v. Petco Animal Supplies, Inc. et al.*,  
17 Case No. 113CV243043 (the “Action”), alleging violations of California Health & Safety Code  
18 § 25249.6, based on the alleged exposures to lead contained in certain photo frames and aquarium  
19 nets with vinyl/PVC handles and DEHP contained in vinyl/PVC raincoats and aquarium nets with  
20 vinyl/PVC handles sold by Petco in the State of California..

21           **1.6 Effective Date**

22           For purposes of this Consent Judgment, the term “Effective Date” shall mean the date on  
23 which this Consent Judgment is approved by the Court.

24           **1.7 Consent to Jurisdiction**

25           For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
26 jurisdiction over Petco as to the allegations in the Complaint, that venue is proper in the County of  
27 Santa Clara, and that this Court has jurisdiction to enter and enforce the provisions of this Consent  
28 Judgment.

1           **1.8 Duties Limited to California**

2           This Consent Judgment shall have no effect on products sold by Petco for sale, distribution  
3 or use outside of California.

4           **1.9 No Admission**

5           Petco denies the material, factual and legal allegations contained in Brimer’s Notice and  
6 maintains that all products that it has sold and distributed in California, including the Products, have  
7 been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as  
8 an admission by Petco of any fact, finding, issue of law or violation of law; nor shall compliance  
9 with this Consent Judgment constitute or be construed as an admission by Petco of any fact, finding,  
10 conclusion, issue of law or violation of law. However, this section shall not diminish or otherwise  
11 affect the obligations, responsibilities and duties of Petco under this Consent Judgment.

12       **2. INJUNCTIVE RELIEF: REFORMULATION**

13           **2.1 Reformulation Standards**

14           “Reformulated Products” are defined as:

- 15                   (a) those Products that contain a total lead content of less than or equal to 100 parts  
16                   per million (“ppm”) when analyzed pursuant to Environmental Protection  
17                   Agency testing methodologies 3050B and/or 6010B in each accessible  
18                   component; and  
19                   (b) those Products containing DEHP in concentrations less than 0.1 percent (1,000  
20                   parts per million) when analyzed pursuant to U.S. Environmental Protection  
21                   Agency testing methodologies 3580A and 8270C or any other methodology  
22                   utilized by federal or state agencies for the purpose of determining the DEHP  
23                   content in a solid substance.

24           **2.2 Reformulation Commitment**

25           As of September 1, 2013, all Products manufactured, imported, distributed, sold and/or  
26 offered for sale in the State of California by Petco shall be Products that qualify as Reformulated  
27 Products as defined in Section 2.1 above.

1       **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

2           In settlement of all the claims referred to in this Consent Judgment, Petco shall pay a total of  
3       \$22,500 in civil penalties in accordance with this Section. Each penalty payment will be allocated  
4       in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds  
5       remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the  
6       remaining 25% of the penalty remitted to Brimer, as follows:

7           **3.1 Initial Civil Penalty**

8           Petco shall pay an initial civil penalty in the amount of \$6,500 within ten days of the  
9       Effective Date. Petco shall issue two separate checks to: (a) “OEHHA” in the amount of \$4,875;  
10       and (b) “The Chanler Group in Trust for Russell Brimer” in the amount of \$1,625. All penalty  
11       payments shall be delivered to the addresses listed in Section 3.3 below.

12           **3.2 Final Civil Penalty**

13           Petco shall pay a final civil penalty of \$16,000 on or before October 1, 2013. The final civil  
14       penalty shall be waived in its entirety, however, if, no later than September 15, 2013, an officer of  
15       Petco provides Brimer with written certification that, as of the date of such certification and  
16       continuing into the future, Petco has met the reformulation standard specified in Section 2 above,  
17       such that all Products manufactured, imported, distributed, sold and offered for sale in California by  
18       Petco are Reformulated Products. Brimer must receive any such certification on or before  
19       September 15, 2013. The certification in lieu of a final civil penalty payment provided by this  
20       Section is a material term, and time is of the essence. Petco shall issue two separate checks for its  
21       final civil penalty payments to: (a) “OEHHA” in the amount of \$12,000; and (b) “The Chanler  
22       Group in Trust for Russell Brimer” in the amount of \$4,000.

23           **3.3 Payment Procedures**

24           **3.3.1. Issuance of Payments.** Payments shall be delivered as follows:

- 25                   (a) All payments owed to Brimer, pursuant to Sections 3.1 through 3.2, shall  
26                   be delivered to the following payment address:

1 The Chanler Group  
2 Attn: Proposition 65 Controller  
3 2560 Ninth Street  
4 Parker Plaza, Suite 214  
5 Berkeley, CA 94710

6 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Sections  
7 3.1 through 3.2, shall be delivered directly to OEHHA (Memo line “Prop  
8 65 Penalties”) at the following addresses:

9 For United States Postal Service Delivery:

10 Mike Gyrics  
11 Fiscal Operations Branch Chief  
12 Office of Environmental Health Hazard Assessment  
13 P.O. Box 4010  
14 Sacramento, CA 95812-4010

15 For Non-United States Postal Service Delivery:

16 Mike Gyrics  
17 Fiscal Operations Branch Chief  
18 Office of Environmental Health Hazard Assessment  
19 1001 I Street  
20 Sacramento, CA 95814

21 With a copy of the checks payable to OEHHA mailed to The Chanler  
22 Group at the address set forth above in 3.3.1(a), as proof of payment to  
23 OEHHA.

24 **3.3.2 Issuance of 1099 Forms.** After each penalty payment, Petco shall issue  
25 separate 1099 forms for each payment to Brimer, whose address and tax identification number  
26 shall be furnished upon request after this Consent Judgment has been fully executed by the Parties,  
27 and OEHHA at the addresses listed in Section 3.3.1 above.

#### 28 **4. REIMBURSEMENT OF FEES AND COSTS**

The parties acknowledge that Brimer and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. Brimer then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The parties then attempted to (and did) reach an accord on the compensation due to

1 Brimer and his counsel under general contract principles and the private attorney general doctrine  
2 codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual  
3 execution of this agreement. Petco shall pay The Chanler Group \$36,000 for fees and costs  
4 incurred as a result of investigating, bringing this matter to Petco’s attention, and negotiating a  
5 settlement in the public interest. Petco shall issue a separate 1099 for fees and costs (EIN: 94-  
6 3171522), shall make the check payable to “The Chanler Group” and shall deliver payment within  
7 ten (10) business days of the Effective Date, to the address listed in Section 3.3.1(a) above.

8 **5. RELEASES**

9 **5.1 Brimer’s Release of Petco**

10 This Consent Judgment is a full, final and binding resolution between Brimer, and Petco, of  
11 any violation of Proposition 65 that was or could have been asserted by Brimer on behalf of himself  
12 his past and current agents, representatives, attorneys, successors and/or assignees, against Petco, its  
13 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,  
14 attorneys, and each entity to whom Petco directly or indirectly distributes or sells Products  
15 including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees,  
16 cooperative members and licensees (“Releasees”), based on their failure to warn about alleged  
17 exposures to lead and DEHP contained in the Products that were manufactured, imported,  
18 distributed, sold and/or offered for sale by Petco in California before September 1, 2013.

19 In further consideration of the promises and agreements herein contained, Brimer on behalf  
20 of himself, his past and current agents, representatives, attorneys, successors and/or assignees,  
21 hereby waives all his rights to institute or participate in, directly or indirectly, any form of legal  
22 action and releases all claims that he may have including, without limitation, all actions and causes  
23 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties,  
24 losses or expenses -- including, but not limited to, investigation fees, expert fees and attorneys’ fees,  
25 but exclusive of fees and costs on appeal -- limited to and arising under Proposition 65 with respect  
26 to lead and DEHP in the Products manufactured, distributed, sold and/or offered for sale by Petco  
27 before the Effective Date (collectively “claims”), against Petco and Releasees.  
28

1 Brimer also, in his individual capacity only and *not* in his representative capacity, provides a  
2 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all  
3 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,  
4 liabilities and demands of Brimer of any nature, character or kind, known or unknown, suspected or  
5 unsuspected, arising out of alleged or actual exposure to lead and DEHP in the Products  
6 manufactured, distributed or sold by Petco or Releasees. Brimer acknowledges that he is familiar  
7 with Section 1542 of the California Civil Code, which provides as follows:

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

12 Brimer, in his individual capacity only and not in his representative capacity, expressly  
13 waives and relinquishes any and all rights and benefits which he may have under, or which may be  
14 conferred on him by the provisions of Section 1542 of the California Civil Code as well as under  
15 any other state or federal statute or common law principle of similar effect, to the fullest extent that  
16 he may lawfully waive such rights or benefits pertaining to the released matters. In furtherance of  
17 such intention, the release hereby given shall be and remain in effect as a full and complete release  
18 notwithstanding the discovery or existence of any such additional or different claims or facts arising  
19 out of the released matters.

## 20 **5.2 Petco's Release of Brimer**

21 Petco, on behalf of itself, its past and current agents, representatives, attorneys, successors  
22 and/or assignees, hereby waives any and all claims against Brimer and his attorneys and other  
23 representatives, for any and all actions taken or statements made (or those that could have been  
24 taken or made) by Brimer and his attorneys and other representatives, whether in the course of  
25 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter or with  
26 respect to the Products.

27 Petco acknowledges that it is familiar with Section 1542 of the California Civil Code, which  
28 provides as follows:

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

6 Petco expressly waives and relinquishes any and all rights and benefits which it may have  
7 under, or which may be conferred on it by the provisions of Section 1542 of the California Civil  
8 Code as well as under any other state or federal statute or common law principle of similar effect,  
9 to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released  
10 matters. In furtherance of such intention, the release hereby given shall be and remain in effect as  
11 a full and complete release notwithstanding the discovery or existence of any such additional or  
12 different claims or facts arising out of the released matters.

13 **6. COURT APPROVAL**

14 This Consent To Judgment is not effective until it is approved and entered by the Court  
15 and shall be null and void if, for any reason, it is not approved and entered by the Court within  
16 nine months after it has been fully executed by all Parties.

17 **7. SEVERABILITY**

18 If, subsequent to the execution of this Consent Judgment, any of the provisions of this  
19 Consent Judgment are deemed by a court to be unenforceable, the validity of the enforceable  
20 provisions remaining shall not be adversely affected.

21 **8. GOVERNING LAW**

22 The terms of this Consent Judgment shall be governed by the laws of the State of California  
23 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise  
24 rendered inapplicable by reason of law generally, or if any of the provisions of this Consent  
25 Judgment are rendered inapplicable or no longer required as a result of any such repeal or  
26 preemption or rendered inapplicable by reason of law generally as to the Products, then Petco shall  
27 provide written notice to Brimer of any asserted change in the law, and shall have no further  
28 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products

1 are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Petco from any  
2 obligation to comply with any pertinent state or federal toxics control law.

3 **9. NOTICES**

4 Unless specified herein, all correspondence and notices required to be provided pursuant to  
5 this Consent Judgment shall be in writing and: (i) personally delivered; (ii) sent by first-class  
6 (registered or certified mail) return receipt requested; or (iii) sent by overnight courier, to one party  
7 by the other party at the following addresses:

8 For Petco Animal Supplies, Inc.:

9 Stan Little, Esq.  
10 Petco Animal Supplies, Inc.  
11 9125 Rehco Road  
12 San Diego, CA 92121

11 with copy to:

12 Mark E. Elliott  
13 Pillsbury Winthrop Shaw Pittman LLP  
14 725 S. Figueroa St, Suite 2800  
15 Los Angeles, CA 90017

15 For Brimer:

16 Proposition 65 Coordinator  
17 The Chanler Group  
18 2560 Ninth Street  
19 Parker Plaza, Suite 214  
20 Berkeley, CA 94710-2565

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

21 **10. COUNTERPARTS; FACSIMILE AND SIGNATURES**

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

25 **11. POST EXECUTION ACTIVITIES**

26 Brimer agrees to comply with the reporting form requirements referenced in California  
27 Health & Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to California  
28 Health & Safety Code § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of

1 this Consent Judgment. In furtherance of obtaining such approval, Brimer and Petco and their  
2 respective counsel agree to mutually employ their best efforts to support the entry of this agreement  
3 as a Consent Judgment and to obtain judicial approval of the same in a timely manner. For  
4 purposes of this section, “best efforts” shall include, at a minimum, cooperating on the drafting and  
5 filing of any papers in support of the required motion for judicial approval.

6 **12. MODIFICATION**

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

10 **13. ENTIRE AGREEMENT**

11 This Consent Judgment contains the sole and entire agreement and understanding of the  
12 Parties with respect to the entire subject matter hereof, and any and all prior discussions,  
13 negotiations, commitments, and understandings related hereto. No representations, oral or  
14 otherwise, express or implied, other than those contained herein have been made by any party  
15 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed  
16 to exist or to bind any of the Parties.

1 **14. 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

5  
6 **AGREED TO:**

**AGREED TO:**

7  
8 Date: April 12, 2013

Date: \_\_\_\_\_

9  
10 By:  \_\_\_\_\_  
11 Russell Brimer

By: \_\_\_\_\_  
Darragh J. Davis  
Vice-President and General Counsel  
Petco Animal Supplies, Inc.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

14. **AUTHORIZATION**

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

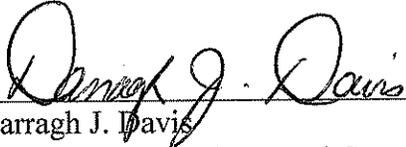
**AGREED TO:**

**AGREED TO:**

Date: \_\_\_\_\_

Date: 4/12/13

By: \_\_\_\_\_  
Russell Brimer

By:   
Darragh J. Davis  
Vice-President and General Counsel  
Petco Animal Supplies, Inc.