

1 Laralei Paras, State Bar No. 203319
THE CHANLER GROUP
2 2560 Ninth Street
Parker Plaza, Suite 214
3 Berkeley, CA 94710-2565
Telephone:(510) 848-8880
4 Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
RUSSELL BRIMER

6 Andrew Do, State Bar No. 147084
7 OSWALD & YAP, APC
16148 Sand Canyon Ave.
8 Irvine, CA 92618
Telephone: (949) 788-8900
9 Facsimile: (866) 303-9026

10 Attorneys for Defendant
VISUAL LAND, INC.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,
Plaintiff,
v.
VISUAL LAND, INC.; *et al.*,
Defendants.

Case No. RG13675985

**[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 (“Brimer”),
4 and defendant, Visual Land, Inc. (“VLI”), with Brimer and VLI each referred to individually as a
5 “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 improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Brimer alleges that VLI has manufactured, imported, distributed, sold and/or offered for sale
16 in the State of California, vinyl/PVC headphone cords containing lead. Lead is listed pursuant to
17 Proposition 65 as a chemical known to the State of California to cause birth defects and other
18 reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are defined as vinyl/PVC headphone
21 cords containing lead including, but not limited to, *V-Touch Pro Touch Screen Media Player with In-*
22 *Ear Headphones, Model ME-965L-4GB-BLK (#8 28063 49652 9)*, manufactured, imported,
23 distributed, sold and/or offered for sale by VLI in the State of California, hereinafter “Products.”

24 **1.6 Notice of Violation**

25 On December 28, 2012, Brimer served VLI and various public enforcement agencies with a
26 document entitled “60-Day Notice of Violation” (“Notice”) that provided the recipients with notice
27 that VLI was in violation of California Health & Safety Code § 25249.6 for failing to warn
28

1 consumers that its Products exposed users in the State of California to lead. No public enforcer has
2 diligently prosecuted the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On March 4, 2013, Brimer filed the instant action (“Complaint”) against VLI for the alleged
5 violations of Health & Safety Code § 25249.6 that are the subject of the Notice.

6 **1.8 No Admission**

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

15 **1.9 Consent to Jurisdiction**

16 For purposes of this Consent Judgment only, the Parties stipulate that the Court has
17 jurisdiction over VLI as to the allegations in the Complaint, that venue is proper in Alameda County,
18 and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment.

19 **1.10 Effective Date**

20 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date the
21 Consent Judgment is signed by both Parties.
22
23
24
25
26
27
28

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

2 Commencing on the Effective Date, VLI shall only sell, ship or offer for sale in California
3 Products that are: (1) sold or shipped with one of the clear and reasonable warnings set forth in
4 subsections 2.1(a) and (b); or (2) exempt pursuant to Section 2.2 as Reformulated Products as
5 defined in Section 2.3.

6 **2.1 Product Warnings**

7 Each warning shall be prominently placed with such conspicuousness as compared with
8 other words, statements, designs or devices as to render it likely to be read and understood by an
9 ordinary individual under customary conditions before purchase or use. Each warning shall be
10 provided in a manner such that the consumer or user understands to which specific Product(s) the
11 warning applies, so as to minimize the risk of consumer confusion. If Visual Land posts warnings
12 on its Products pursuant to Section 2.1(a)(i), no additional warning is required either in Mail Order
13 Catalogs or Internet Sales, pursuant to the alternative warning provisions in Section 2.1(b) below.

14 **(a) Retail Store Sales**

15 **(i) Product Labeling.** VLI may affix a warning to the packaging,
16 labeling or directly on any Products that are not Reformulated Products sold in retail outlets in
17 California that states:

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

20 **(ii) Point-of-Sale Warnings.** Alternatively, VLI may provide warning
21 signs in the form below to its retailers in California with instructions to post the signs in close
22 proximity to the point of display of any such Products for the benefit of its retailers' customers.

23 **WARNING:** This product contains lead, a chemical
24 known to the State of California to cause
 birth defects or other reproductive harm.

25 Where any such Products are sold in proximity to other like items or to those that do not require a
26 warning (*e.g.*, Reformulated Products as defined in Section 2.3), the following statement must be
27 used:

28

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

WARNING: The following product(s) contain lead, a chemical known to the State of California to cause birth defects or other reproductive harm.

[list product(s) for which warning is required]

(b) **Mail Order Catalog and Internet Sales.** In the event that VLI sells any Products that are not Reformulated Products via mail order catalog or the Internet to customers located in California after the Effective Date, VLI shall provide a warning for such Products sold via mail order catalog or the Internet to California residents pursuant to section 2.1(a)(i) above, or, in the alternative, in the mail order catalog or on the website. Any warnings given in the mail order catalog or on the website shall identify the specific Product(s) to which the warning applies as further specified in Sections 2.1(b)(i) and (ii).

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

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

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

WARNING: Certain products identified with this symbol ▼¹ and offered for sale in this catalog contain lead, a chemical known to the State of California to cause birth defects or other reproductive harm.

¹ The symbol “▼” is to appear in the color red.

1 The designated symbol must appear on the same page and in close proximity to the display and/or
2 description of the Product(s). On each page where the designated symbol appears, VLI must
3 provide a header or footer directing the consumer to the warning language and definition of the
4 designated symbol.

5 (ii) **Internet Website Warning.** A warning may be given in conjunction
6 with the sale of the Products via the Internet, provided it is displayed to a purchaser during the
7 checkout process and appears either: (a) on the same web page on which a Product is displayed; (b)
8 on the same web page as the order form for a Product; or (c) on the same page as the price for any
9 Product(s).

10 2.2 **Exceptions to Warning Requirements**

11 The warning requirements set forth in Section 2.1 shall not apply to Reformulated Products
12 (as defined in Section 2.3 below).

13 2.3 **Reformulation Standards**

14 Reformulated Products are defined as those Products that contain no more than 90 parts per
15 million lead content by weight in any accessible component (i.e., any component that can be touched
16 during reasonably a foreseeable use) when analyzed pursuant to Environmental Protection Agency
17 (“EPA”) testing methodologies 3050B and 6010B, and that yield a result of no more than 1.0
18 micrograms of lead when sampled pursuant to the NIOSH 9100 testing protocol and analyzed
19 pursuant to EPA testing methodologies 3050B and 6010B, or equivalent methodologies used by
20 federal or state agencies to determine lead content in a solid substance.

21 2.4 **Vendor Notification Requirement**

22 To the extent is has not already done so, no more than ten (10) days after the Effective Date,
23 VLI shall provide the reformulation standards specified in section 2.3 for Reformulated Products to
24 any and all of its vendors of Products and of accessible component parts used in the Products that will
25 be sold or offered for sale to California consumers, and shall instruct each vendor to use its best
26 efforts to provide only Reformulated Products, as defined in Section 2.3.

27
28

1 **3. MONETARY PAYMENTS**

2 **3.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

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

8 **3.1.1 Initial Civil Penalty.** Within five (5) days of the Effective Date, VLI shall
9 pay an initial civil penalty in the amount of \$7,500, in two separate checks made payable as follows:
10 (a) “OEHHA” in the amount of \$5,625; and (b) “The Chanler Group in Trust for Russell Brimer” in
11 the amount of \$1,875.

12 **3.1.2 Final Civil Penalty.** On or before August 1, 2014, VLI shall pay a final civil
13 penalty of \$15,000, in two separate checks for made payable as follows: (a) “OEHHA” in the amount
14 of \$11,250; and (b) “The Chanler Group in Trust for Russell Brimer” in the amount of \$3,750. The
15 final civil penalty shall be waived in its entirety, however, if, no later than July 16, 2014, an officer of
16 VLI provides Brimer with written certification that, as of the date of the certification (“Certification
17 Date”) and continuing into the future, VLI has met the reformulation standard specified in Section 2.3
18 above, such that all Products manufactured, imported, sold and/or distributed for sale in California by
19 VLI are Reformulated Products. The certification in lieu of a final civil penalty payment provided by
20 this Section is a material term, and time is of the essence. In the event VLI fails to comply with this
21 Section 3.1.2, Plaintiff’s counsel shall provide Defendant’s counsel with telephonic and email notice
22 of breach, after which Defendant will have seventy-two (72) hours from receipt of notice of breach
23 within which to cure such breach.

24 **3.2 Reimbursement of Brimer’s Fees and Costs**

25 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
26 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
27 to be resolved after the material terms of the agreement had been settled. Shortly after all other
28 settlement terms had been finalized, VLI expressed a desire to resolve the fee and costs issue. The

1 Parties then attempted to (and did) reach an accord on the compensation due Brimer and his counsel
2 under general contract principles and the private attorney general doctrine codified at Code of Civil
3 Procedure § 1021.5 for all work performed in this matter exclusive of fees and costs incurred on
4 appeal, if any. Under these legal principles, on or before March 3, 2014, VLI shall pay \$55,000 for
5 fees and costs incurred investigating, litigating, and enforcing this matter, including the fees and
6 costs incurred (and to be incurred) drafting, negotiating, and obtaining the Court's approval of this
7 Consent Judgment in the public interest.

8 **3.3 Payment Procedures**

9 **3.3.1 Issuance of Payments.**

10 (a) All payments owed to Plaintiff and his counsel, pursuant to Sections
11 3.1 and 3.2 shall be delivered to the following payment address:

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

17 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to
18 Sections 3.1 shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at one of the
19 following addresses, as appropriate:

20 For United States Postal Service Delivery:

21 Mike Gyurics
22 Fiscal Operations Branch Chief
23 Office of Environmental Health Hazard Assessment
24 P.O. Box 4010
25 Sacramento, CA 95812-4010

26 For Non-United States Postal Service Delivery:

27 Mike Gyurics
28 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

1 3.3.2 Proof of Payment to OEHHA. A copy of each check payable to OEHHA shall
2 be mailed, simultaneous with payment, to The Chanler Group at the address set forth in Section
3 3.3.1(a) above, as proof of payment to OEHHA.

4 3.3.3 Tax Documentation. VLI shall issue a separate 1099 form for each payment
5 required by this Section to: (a) Russell Brimer, whose address and tax identification number shall be
6 furnished upon request after this Consent Judgment has been fully executed by the Parties; (b)
7 OEHHA, who shall be identified as “California Office of Environmental Health Hazard
8 Assessment” (EIN: 68-0284486) in the 1099 form, to be delivered directly to OEHHA, P.O. Box
9 4010, Sacramento, CA 95814, and (c) “The Chanler Group” (EIN: 94-3171522) to the address set
10 forth in Section 3.3.1(a) above.

11 **4. CLAIMS COVERED AND RELEASED**

12 **4.1 Brimer’s Release of Proposition 65 Claims**

13 Brimer, acting on his own behalf and in the public interest, waives all rights to institute or
14 participate in, directly or indirectly, any form of legal action and releases VLI, its parents,
15 subsidiaries, affiliated entities, successors, and/or assignees, that are under common ownership,
16 directors, officers, employees, shareholders, attorneys, and each entity to whom VLI directly or
17 indirectly distributes or sells Products, including, but not limited to, downstream distributors,
18 wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees
19 (“Releasees”), from all claims including, without limitation, all actions and causes of action in law
20 or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or
21 expenses, investigation fees, expert fees, and attorneys’ fees of any nature whatsoever arising from
22 violations of Proposition 65 up through the Effective Date based on exposures to lead from the
23 Products as set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes
24 compliance with Proposition 65 with respect to exposures to lead from the Products sold by VLI
25 before the Effective Date as set forth in the Notice.

26 Brimer, in his individual capacity only and *not* in his representative capacity, also provides a
27 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
28 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,

1 liabilities and demands of Brimer of any nature, character or kind, whether known or unknown,
2 suspected or unsuspected, arising out of alleged or actual exposures to lead in the Products
3 imported, manufactured, sold or distributed for sale by VLI before the Effective Date.

4 **4.2 VLI's Release of Brimer**

5 VLI on behalf of itself, its past and current agents, representatives, attorneys, successors,
6 and/or assignees, hereby waives any and all claims against Brimer, his attorneys and other
7 representatives, for any and all actions taken or statements made (or those that could have been
8 taken or made) by Brimer and his attorneys and other representatives, whether in the course of
9 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with
10 respect to the 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 all Parties. If the Court does not approve this Consent Judgment within
15 one year of the Effective Date, all monies paid pursuant to Section 3 herein shall be returned to VLI.

16 **6. SEVERABILITY**

17 If, subsequent to the execution of this Consent Judgment, any provision is Brimer by a court
18 to be unenforceable, the validity of the remaining provisions shall not be 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 or is otherwise
22 rendered inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment
23 are rendered inapplicable or no longer required as a result of any such repeal or preemption or
24 rendered inapplicable by reason of law generally as to the Products, then VLI shall provide written
25 notice to Brimer of any asserted change in the law, and shall have no further obligations pursuant to
26 this Consent Judgment with respect to, and to the extent that, the Products are so affected. Nothing in
27 this Consent Judgment shall be interpreted to relieve VLI from any obligation to comply with any
28 pertinent state or federal toxics control law.

1 **8. NOTICES**

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

6 For VLI:

7 Gary Lu, President
8 Visual Land, Inc.
9 17785 Center Court Drive, Suite 670
 Cerritos, CA 90703

For Brimer:

Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

10 With a copy on behalf of VLI to:

11 Andrew H. Do, Esq.
12 OSWALD & YAP, APC
 16148 Sand Canyon
 Irvine, CA 92618

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

15 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

19 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

20 Brimer agrees to comply with the reporting form requirements referenced in California Health
21 & Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to California Health &
22 Safety Code § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of the
23 settlement. In furtherance of obtaining such approval, Brimer and VLI agree to mutually employ
24 their best efforts, and those of their counsel, to support the entry of this agreement as a Consent
25 Judgment and to obtain judicial approval of the settlement in a timely manner. For purposes of this
26 section, “best efforts” shall include, at a minimum, cooperating on the drafting and filing of the
27 necessary moving papers and supporting the motion for judicial approval.
28

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

11. **MODIFICATION**

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

12. **AUTHORIZATION**

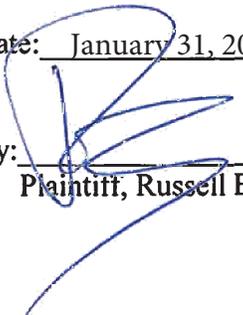
The undersigned are authorized to execute this Consent Judgment and have read, understood, and agree to all of the terms and conditions contained herein.

AGREED TO:

AGREED TO:

Date: January 31, 2014

Date: 1/30/2014

By: 
Plaintiff, Russell Brimer

By: 
Gary Lu, President
Defendant, Visual Land, Inc.