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10 Attorneys for Plaintiff  
COLART AMERICAS INC

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13 SUPERIOR COURT OF CALIFORNIA  
14 FOR THE COUNTY OF ALAMEDA  
15 UNLIMITED CIVIL JURISDICTION  
16

17 RUSSELL BRIMER,  
18 Plaintiff,  
19 vs.  
20 COLART AMERICAS INC.; and  
DOES 1-150, inclusive,  
21 Defendants.  
22

Case No. RG11563414  
**STIPULATION AND [PROPOSED]  
CONSENT JUDGMENT**

1     **1. INTRODUCTION**

2             **1.1 Russell Brimer and ColArt/Americas, Inc.**

3             This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer”  
4     or “Plaintiff”) and defendant ColArt Americas, Inc. (“ColArt” or “Defendant”), with Plaintiff and  
5     Defendant collectively referred to hereinafter as the “Parties.”

6             **1.2 Plaintiff**

7             Brimer is an individual residing in the State of California who seeks to promote awareness  
8     of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous  
9     substances contained in consumer products.

10            **1.3 Defendant**

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

14            **1.4 General Allegations**

15            Brimer alleges that Defendant has manufactured, distributed and/or sold certain cases for art  
16     supplies containing lead in the State of California without providing the health hazard warnings  
17     required under Proposition 65. Lead is identified under Proposition 65 as a chemical known to  
18     cause birth defects or other reproductive harm. Lead as listed by the State of California under  
19     Proposition 65 shall be referred to hereinafter as the “Listed Chemical.”

20            **1.5 Product Description**

21            The products that are covered by this Consent Judgment are cases for art supplies  
22     containing lead, including but not limited to, *Liquitex Basics Acrylic Color Set Painter’s Box No*  
23     *101088 (# 0 94376 97649 6)*, which ColArt manufactured, distributed, and/or sold in the State of  
24     California. These cases for art supplies containing lead are referred to hereinafter as the  
25     “Products.”

26            **1.6 Notice of Violation**

27            On October 15, 2010, Brimer served Defendant and the Office of the California Attorney  
28     General, all California counties’ District Attorneys and all City Attorneys of California cities with

1 populations exceeding 750,000 (collectively, "Public Enforcers") with a 60-Day Notice of  
2 Violation ("Notice") that alleged violations of Proposition 65 in connection with the sale of the  
3 Products containing the Listed Chemical. To the best of the Parties' knowledge, no Public  
4 Enforcer has prosecuted any of the allegations set forth in the Notice.

5 **1.7 Complaint**

6 On or about March 1, 2011, Brimer filed the instant action ("Complaint") against Defendant  
7 alleging violations of Proposition 65 based on Defendant's failure to give clear and reasonable  
8 warnings before allegedly causing exposures to the Listed Chemical contained in the Products.

9 **1.8 No Admission**

10 Defendant denies the material, factual, and legal allegations contained in the Notice and  
11 Complaint, and maintains that all of the products that it has sold and distributed in California,  
12 including the Products, have been, and are, in compliance with all laws, including, without  
13 limitation, Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by  
14 Defendant of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance  
15 with this Consent Judgment constitute or be construed as an admission by Defendant of any fact,  
16 finding, conclusion, issue of law, or violation of law, such being specifically denied by Defendant.  
17 However, this Section shall not diminish or otherwise affect Defendant's obligations,  
18 responsibilities, and duties under this Consent Judgment.

19 **1.9 Consent to Jurisdiction**

20 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
21 jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper in  
22 the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of  
23 this Consent Judgment as a full and binding resolution of all claims against Defendant which were  
24 raised, or could have been raised, in the Complaint and in the Notice.

25 **1.10 Effective Date**

26 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date the  
27 Consent Judgment is executed by all Parties.

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1 **2.0 INJUNCTIVE RELIEF**

2 **2.1 Product Warnings**

3 Commencing on the Effective Date, ColArt shall not sell, ship, or offer to ship for sale in  
4 California any Products containing levels of the Listed Chemical unless such Products are: (1) sold  
5 or shipped with one of the clear and reasonable warnings set forth in subsections 2.1(a) and (b); or  
6 (2) exempt pursuant to Section 2.2 as compliant with the reformulation standards set forth in  
7 Sections 2.3.

8 Each warning shall be prominently placed with such conspicuousness as compared with  
9 other words, statements, designs, or devices as to render it likely to be read and understood by an  
10 ordinary individual under customary conditions before purchase or use. Each warning shall be  
11 provided in a manner such that the consumer or user understands to which specific Product the  
12 warning applies, so as to minimize the risk of consumer confusion.

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

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

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

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

23 **WARNING:** This product case contains Lead, a  
24 chemical 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  
26 require a warning (e.g., Reformulated Products as defined in Section 2.3), the following statement  
27 must be used:

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1                                   **WARNING:** The cases for the following product(s)  
2                                   contain Lead, a chemical known to the  
3                                   State of California to cause birth defects  
   or other reproductive harm:  
   [list product(s) for which warning is required]

4                   (b)       **Mail Order Catalog and Internet Sales.** In the event that ColArt sells any  
5 Products that are not Reformulated Products via mail order catalog or the Internet to customers  
6 located in California after the Effective Date, ColArt shall provide a warning for such Products sold  
7 via mail order catalog or the Internet to California residents: (1) in the mail order catalog; or (2) on  
8 the website. Warnings given in the mail order catalog or on the website shall identify the specific  
9 Product to which the warning applies as further specified in Sections 2.1(b)(i) and (ii).

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

14                                   **WARNING:** These product cases contain Lead, a  
15                                   chemical known to the State of California  
   to cause birth defects or other  
   reproductive harm.

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

21                                   **WARNING:** Cases of certain products identified with  
22                                   this symbol ▼ and offered for sale in this  
23                                   catalog contain Lead, a chemical known  
   to the State of California to cause birth  
   defects or other reproductive harm.

24                   The designated symbol must appear on the same page and in close proximity to the display  
25 and/or description of the Product. On each page where the designated symbol appears, ColArt  
26 must provide a header or footer directing the consumer to the warning language and definition of  
27 the designated symbol.

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1 If ColArt elects to provide warnings in the mail order catalog, then the warnings must be  
2 included in all catalogs offering to sell one or more Products printed after the Effective Date.

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

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

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

19 **WARNING:** Cases of products identified on this  
20 page with the following symbol ▼  
21 contain Lead, a chemical known to the  
22 State of California to cause birth  
23 defects or other reproductive harm.

## 24 **2.2 Exceptions to Warning Requirements**

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

## 27 **2.3 Reformulation Standards**

28 As of the Effective Date, ColArt shall use its best efforts to distribute, ship, sell or offer to  
ship for sale in California only Reformulated Products. For purposes of this Section, "best efforts"  
includes, without limitation, complying with the vendor notification requirements contained in  
Section 2.4. Reformulated Products shall mean Products that contain no more than 100 parts per  
million lead content when analyzed pursuant to Environmental Protection Agency testing

1 methodologies 3050B and 6010B for lead, or equivalent methods as may be allowed under  
2 Proposition 65, and that yield a result of no more than 1.0 micrograms of lead when analyzed  
3 pursuant to the NIOSH Test Method No. 9100. By entering into this Consent Judgment, the Parties  
4 do not intend to expand or restrict any obligations or responsibilities that may be imposed upon  
5 ColArt by laws other than Proposition 65, nor do the Parties intend this Consent Judgment to affect  
6 any defenses available to ColArt under laws other than Proposition 65.

#### 7 **2.4 Vendor Notification Requirement**

8 To the extent is has not already done so, no more than thirty (30) days after the Effective  
9 Date, ColArt shall provide the reformulation standards specified in section 2.3 for Reformulated  
10 Products to each of its vendors of Products that will be sold or offered for sale to California  
11 consumers, and shall instruct each vendor to use its best efforts to provide only Reformulated  
12 Products, as such Products are defined in Section 2.3.

### 13 **3. MONETARY PAYMENTS**

#### 14 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

15 Pursuant to Health & Safety Code § 25249.7(b), and in settlement of all of the claims alleged  
16 in the Notice and Complaint and referred to in this Consent Judgment, ColArt shall pay a total of  
17 \$18,000 in civil penalties. ColArt shall pay an initial civil penalty of \$8,500, to be apportioned in  
18 accordance with Health & Safety Code §§ 25249.12(c)(1) & (d), with 75% of the penalty amount  
19 remitted to the State of California's Office of Environmental Health Hazard Assessment and the  
20 remaining 25% remitted to Brimer.

21 ColArt shall issue two checks for the penalty payment: (a) one check made payable to "The  
22 Chanler Group in Trust for California's Office of Environmental Health Hazard Assessment" in the  
23 amount of \$6,375, representing 75% of the total penalty; and (b) one check made payable to "The  
24 Chanler Group in Trust for Russell Brimer" in the amount of \$2,125, representing 25% of the total  
25 penalty. Two 1099 forms shall be issued for the above payments to: (a) Office of Environmental  
26 Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b)  
27 Russell Brimer, whose address and tax identification number shall be furnished, upon execution of  
28 this Agreement. The payment shall be delivered to Brimer's counsel within ten days of the Effective

1 Date at the following address:

2 The Chanler Group  
3 Attn: Proposition 65 Controller  
4 2560 Ninth Street  
5 Parker Plaza, Suite 214  
6 Berkeley, CA 94710-2565

7 The second civil penalty payment of \$10,000 is due on June 30, 2011; however, this  
8 amount shall be waived in its entirety if ColArt certifies (in writing to Brimer's counsel by June 15,  
9 2011) that it all Products that it has distributed, shipped, sold or offered for sale in California as of  
10 June 1, 2011 constitute Reformulated Products pursuant to Section 2.3 above. If the certification is  
11 not received, then the second civil penalty amount shall be apportioned in the same manner  
12 outlined above and delivered to Brimer's counsel at the above address on or before June 30, 2011.

### 13 **3.2 Reimbursement of Attorney's Fees and Costs**

14 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without  
15 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee  
16 issue to be resolved after the material terms of the agreement had been settled. ColArt then  
17 expressed its preference to resolve the fee and cost issue shortly after the other settlement terms had  
18 been finalized. As such, the Parties attempted to (and did) reach an accord on the compensation  
19 due to Brimer and his counsel under general contract principles and the private attorney general  
20 doctrine codified at California Code of Civil Procedure ("CCP") § 1021.5, for all work performed  
21 in this matter. Under these legal principles, ColArt shall pay \$35,250 for fees and costs incurred as  
22 a result of investigating, bringing this matter to ColArt's attention, litigating, and negotiating a  
23 settlement in the public interest. ColArt shall issue a separate 1099 for fees and costs (EIN: 94-  
24 3171522) , shall make its check payable to "The Chanler Group," and shall deliver payment to  
25 Brimer's counsel within ten days of the Effective Date at the following address:

26 The Chanler Group  
27 Attn: Proposition 65 Controller  
28 2560 Ninth Street, Suite 214  
Berkeley, CA 94710

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1 **4. RELEASE OF ALL CLAIMS**

2 **4.1 Brimer's Release of ColArt**

3 In further consideration of the promises and agreements herein contained, and for the  
4 payments to be made pursuant to Section 3 above, Brimer, on behalf of himself, his past and  
5 current agents, representatives, attorneys, including, without limitation, The Chanler Group,  
6 successors, and/or assignees (collectively, "Releasor"), and in the interest of the general public,  
7 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action  
8 and releases all claims, including, without limitation, all actions and causes of action, in law or in  
9 equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses  
10 (including, but not limited to, investigation fees, expert fees, and attorney's fees) of any nature  
11 whatsoever, whether fixed or contingent (collectively "Claims"), that were brought or could have  
12 been brought against ColArt, its subsidiaries or affiliates, and each of its past and current  
13 downstream customers, distributors, wholesalers, suppliers, licensors, licensees, auctioneers,  
14 retailers, or any other person in the course of doing business, and the successors and assigns of any  
15 of them who may use, maintain, manufacture, distribute, advertise, market or sell the Products in  
16 California, and the officers, directors, managers, employees, members, shareholders, agents,  
17 insurers and representatives of each of them (collectively "Releasees"), based on the facts alleged  
18 in the Notice and Complaint. The Parties further understand and agree that this release shall not  
19 extend upstream to any third parties that manufactured the Products or any component parts  
20 thereof, or to any distributors or suppliers who sold the Products or any component parts thereof to  
21 Defendant.

22 This Consent Judgment is a full, final, and binding resolution between the Releasor, acting  
23 on behalf of himself and on behalf of the general public in the public interest pursuant to Health &  
24 Safety Code § 25249.7(d), and Releasees, as to all Claims arising from Releasees' alleged failure to  
25 provide clear, reasonable, and lawful warnings of exposures to the Listed Chemical contained in the  
26 Products sold in California. Compliance with the terms of this Consent Judgment resolves any  
27 issue, now and in the future, concerning compliance by ColArt and its Releasees with the  
28

1 requirements of Proposition 65 with respect to alleged exposure to the Listed Chemical from the  
2 Products distributed or sold by ColArt within California.

3 **4.2 ColArt's Release of Brimer**

4 ColArt waives any and all claims against Brimer, his attorneys and other representatives, for  
5 any and all actions taken or statements made (or those that could have been taken or made) by  
6 Brimer and his attorneys and other representatives, whether in the course of investigating Claims or  
7 otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the  
8 Products.

9 **5. COURT APPROVAL**

10 This Consent Judgment is not effective until it is approved and entered by the Court and  
11 shall be null and void if, for any reason, it is not approved and entered by the Court within one (1)  
12 year after it has been fully executed by all Parties, in which event any monies that have been  
13 provided to Brimer or his counsel pursuant to Section 3 above shall be refunded within fifteen (15)  
14 days after receiving written notice from ColArt that the one-year period has expired.

15 **6. SEVERABILITY**

16 If, subsequent to the execution of this Consent Judgment, any of the provisions of this  
17 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable  
18 provisions remaining 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 as to the Products, then ColArt may provide  
23 written notice to Brimer of any asserted change in the law, and shall have no further obligations  
24 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so  
25 affected. Nothing in this Consent Judgment shall be interpreted to relieve ColArt from any  
26 obligation to comply with any pertinent state or federal toxics control laws.

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3 **8. NOTICES**

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

8 For ColArt:	For Brimer:
Doug Johnston, President.	Proposition 65 Coordinator
ColArt/Americas, Inc.	The Chanler Group
11 Constitution Avenue	2560 Ninth Street, Suite 214
Piscataway, NJ 08854	Berkeley, CA 94710-2565

11 With a copy to:  
12 Ann Grimaldi, Esq.  
13 McKenna Long & Aldridge  
101 California Street, Floor 41  
San Francisco, CA 94111

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

16 **9. ATTORNEY'S FEES**

17 Should Brimer prevail in any proceeding to enforce a violation of this Agreement, he shall  
18 be entitled to his reasonable attorneys' fees and costs incurred as a result of such proceeding.  
19 Should ColArt prevail in any proceeding, it may be awarded its reasonable attorneys' fees and costs  
20 as a result of such proceeding upon a finding by a court that Brimer's proceeding to enforce this  
21 Agreement lacked substantial justification. For purposes of this Agreement, the term substantial  
22 justification shall carry the same meaning as used in the Civil Discovery Act, California Code of  
23 Civil Procedure § 2016 *et seq.*

24 Except as specifically provided in the above paragraph and in Section 3.2, each Party shall  
25 bear its own costs and attorneys' fees.

26 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

27 This Consent Judgment may be executed in counterparts and by facsimile or portable  
28 document format (pdf) signature, each of which shall be deemed an original, and all of which,

1 when taken together, shall constitute one and the same document.

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3 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

4 Brimer agrees to comply with the reporting form requirements referenced in  
5 California Health & Safety Code § 25249.7(f). The Parties acknowledge that, pursuant to Health &  
6 Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this Consent  
7 Judgment. In furtherance of obtaining such approval, Brimer, ColArt and their respective counsel  
8 agree to mutually employ their best efforts to support the entry of this agreement as a Consent  
9 Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. For  
10 purposes of this section, best efforts shall include, at a minimum, cooperating on the drafting and  
11 filing of any papers in support of the required motion for judicial approval.

12 **12. MODIFICATION**

13 This Consent Judgment may be modified only: (1) by written agreement of the Parties and  
14 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion  
15 of any party and entry of a modified consent judgment by the Court. The Attorney General shall be  
16 served with notice of any proposed modification to this Consent Judgment at least fifteen (15) days  
17 in advance of its consideration by the Court. Brimer shall be entitled to his reasonable fees and  
18 costs incurred in the modification process under CCP § 1021.5 if ColArt seeks to modify the terms  
19 of this Consent Judgment.

20 **13. AUTHORIZATION**

21 The undersigned are authorized to execute this Consent Judgment on behalf of themselves  
22 or their respective parties and have read, understood, and agree to all of the terms and conditions of  
23 this Consent Judgment.

24 **AGREED TO:**

**AGREED TO:**

25  
26 By:

  
\_\_\_\_\_  
RUSSELL BRIMER

By:

\_\_\_\_\_  
DOUG JOHNSTON, PRESIDENT  
ColArt Americas, Inc.

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Date: 5/23/11

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22 or their respective parties and have read, understood, and agree to all of the terms and conditions of  
23 this Consent Judgment.

24 **AGREED TO:**

25 By: \_\_\_\_\_  
26 RUSSELL BRIMER

**AGREED TO:**

27 By:  \_\_\_\_\_  
28 DOUG JOHNSTON, PRESIDENT  
ColArt Americas, Inc.

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