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10 RUSSELL BRIMER

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA - UNLIMITED JURISDICTION

13 RUSSELL BRIMER,

14 Plaintiff,

15 v.

16 EMPIRE LEVEL MFG. CORP.; and DOES 1
17 through 150,

18 Defendants.

) Case No. RG10527198

) **CONSENT JUDGMENT**

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Consent Judgment is entered into by and between Plaintiff Russell Brimer (“Brimer”
4 or “Plaintiff”) and Defendant Empire Level Mfg. Corp. (“Empire Level” or “Defendant”), with
5 Plaintiff and Defendant collectively referred to 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 exposure to toxic chemicals and improve human health by reducing or eliminating hazardous
9 substances contained in consumer products.

10 **1.3 Defendant**

11 Defendant employs 10 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, in the State of
16 California, tape measure products with grips that expose users to lead, without first providing
17 “clear and reasonable warning” under Proposition 65. Lead is listed as a reproductive and
18 developmental toxicant pursuant to Proposition 65 and is referred to hereinafter as the “Listed
19 Chemical.” Tape measure products that allegedly expose users to Lead are referred to herein as
20 the “Products”.

21 **1.5 Notice of Violation**

22 On February 12, 2010, Brimer served Defendant and various public enforcement agencies
23 with a document entitled “60-Day Notice of Violation” that provided public enforcers and
24 Defendant with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn
25 consumers that Products that Defendant distributed and/or sold exposed users in California to
26 lead.

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1.6 Complaint

On July 23, 2010, Brimer, acting in the interest of the general public in California, filed a complaint in the Superior Court for the County of Alameda, alleging violations of Health & Safety Code § 25249.6 based on the alleged exposures to lead contained in Products distributed and/or sold by Defendant. This action shall hereinafter be referred to as the "Action."

1.7 No Admission

This Consent Judgment resolves claims that are denied and disputed by Defendant. The Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all claims between the Parties for the purpose of avoiding prolonged litigation. Defendant denies the material factual and legal allegations contained in the Notice and Complaint and maintains that all Products it has manufactured, distributed and/or sold in California have been and are in compliance with all applicable laws. Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Defendant. However, this Section shall not diminish or otherwise affect Defendant's obligations, responsibilities, and duties under this Consent Judgment.

1.8 Consent to Jurisdiction

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

2. INJUNCTIVE RELIEF: REFORMULATION

Tape Measures. Commencing on October 1, 2010, Empire Level shall not manufacture or have shipped to it Products that will be offered for sale in California unless such Products are "Lead Free." For purposes of this Consent Judgment, "Lead Free" Products shall mean Products containing components that may be handled, touched or mouthed by a consumer, and which components yield less than 1.0 microgram of lead when using a wipe test pursuant to NIOSH Test

1 Method 9100, and yield less than 100 parts per million (“ppm”) lead when analyzed pursuant to
2 EPA testing methodologies 3050B and 6010B, or equivalent methodologies utilized by federal or
3 state agencies for the purpose of determining lead content in a solid substance. Products that are
4 Lead Free are referred to hereinafter as “Reformulated Products.”

5 **3. MONETARY PAYMENTS**

6 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

7 3.1.1 In settlement of all claims related to the Products and Listed Chemical
8 referred to in the Complaint and this Consent Judgment, pursuant to Health & Safety Code §
9 25249.7(b), Defendant shall pay \$1,500 in civil penalties.

10 3.1.2 Civil penalties are to be apportioned in accordance with California Health
11 & Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of
12 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty
13 remitted to Brimer as provided by California Health & Safety Code §25249.12(d). Defendant
14 shall issue two separate checks for the penalty payment: (a) one check made payable to “The
15 Chanler Group in Trust for OEHHA” in an amount representing 75% of the total penalty; and (b)
16 one check to “The Chanler Group in Trust for Brimer” in an amount representing 25% of the total
17 penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box
18 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose information
19 shall be provided five (5) calendar days before the payment is due.

20 3.1.3 Payment shall be delivered to Brimer’s counsel at the following address on
21 or before October 1, 2010:

22 The Chanler Group
23 Attn: Proposition 65 Controller
24 2560 Ninth Street
25 Parker Plaza, Suite 214
26 Berkeley, CA 94710-2565
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1 **4. REIMBURSEMENT OF FEES AND COSTS**

2 **4.1 Attorney Fees and Costs**

3 4.1.1 The parties reached an accord on the compensation due to Brimer and his
4 counsel under general contract principles and the private attorney general doctrine codified at
5 California Code of Civil Procedure (C.C.P.) §1021.5, for all work performed through the mutual
6 execution of this agreement and approval by the trial court, excluding any fees on appeal.
7 Defendant shall pay Brimer and his counsel a total of \$30,000 for fees and costs incurred as a
8 result of investigating, bringing this matter to Defendant’s attention, and litigating and negotiating
9 a settlement in the public interest.

10 4.1.2 The payment shall be issued in a third separate check made payable to
11 “The Chanler Group” and shall be delivered to Brimer’s counsel at the following address on or
12 before October 1, 2010:

13 The Chanler Group
14 Attn: Proposition 65 Controller
15 2560 Ninth Street
16 Parker Plaza, Suite 214
17 Berkeley, CA 94710-2565

16 **5. CLAIMS COVERED AND RELEASE**

17 **5.1 Brimer’s Release of Defendant and its Chain of Distribution**

18 5.1.1 This Consent Judgment is a full, final, and binding resolution between
19 Brimer, acting on behalf of himself and in the interest of the general public, and Defendant, its
20 owners, subsidiaries, affiliates, sister and related companies, employees, shareholders, directors,
21 insurers, attorneys, successors, and assigns (“Defendant Releasees”), and all entities to whom
22 they directly or indirectly distribute or sell Products, including but not limited to distributors,
23 wholesalers, customers, retailers, franchisees, cooperative members, and licensees (“Downstream
24 Defendant Releasees”) of any violation of Proposition 65 or any statutory or common law claim
25 that has been or could have been asserted against Defendant Releasees and Downstream
26 Defendant Releasees individually or in the public interest regarding the failure to warn about
27 exposure to the Listed Chemical arising in connection with Products manufactured and/or shipped
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1 prior to the Effective Date even if sold by Downstream Defendant Releasees after the Effective
2 Date. Defendant's compliance with this Consent Judgment shall constitute compliance with
3 Proposition 65 with respect to the Listed Chemical in Products for both Defendant Releasees and
4 Downstream Defendant Releasees for Products distributed and/or sold by Defendant after the
5 Effective Date.

6 5.1.2 Brimer on behalf of himself, his past and current agents, representatives,
7 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives
8 with respect to Products all rights to institute or participate in, directly or indirectly, any form of
9 legal action and releases all claims, including, without limitation, all actions, and causes of action,
10 in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses,
11 or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of
12 any nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"),
13 against Defendant Releasees and Downstream Defendant Releasees that arise under Proposition
14 65 or any other statutory or common law claims that were or could have been asserted in the
15 public interest, as such claims relate to Defendant Releasees' and Downstream Defendant
16 Releasees' alleged failure to warn about exposures to the Listed Chemical contained in the
17 Products.

18 5.1.3 Brimer also, on behalf of himself, his past and current agents,
19 representatives, attorneys, successors, and/or assignees and not in his representative capacity,
20 provides a general release herein which shall be effective as a full and final accord and
21 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
22 damages, losses, claims, liabilities and demands of any nature, character or kind, known or
23 unknown, suspected or unsuspected, against Defendant Releasees and Downstream Defendant
24 Releasees arising under Proposition 65, as such claims relate to Defendant Releasees' alleged
25 failure to warn about exposures to or identification of any chemicals listed under Proposition 65
26 contained in any products sold by Defendant Releasees. Brimer acknowledges that he is familiar
27 with Section 1542 of the California Civil Code, which provides as follows:
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1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES
2 NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE
3 RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS
4 SETTLEMENT WITH THE DEBTOR.

5 Brimer, in his individual capacity only and *not* in his representative capacity, and on behalf of
6 himself, his past and current agents, representatives, attorneys, successors, and/or assignees
7 expressly waives and relinquishes any and all rights and benefits which he may have under, or
8 which may be conferred on him by the provisions of Section 1542 of the California Civil Code as
9 well as under any other state or federal statute or common law principle of similar effect, to the
10 fullest extent that he may lawfully waive such rights or benefits pertaining to the released matters.
11 In furtherance of such intention, the release hereby given shall be and remain in effect as a full
12 and complete release notwithstanding the discovery or existence of any such additional or
13 different claims or facts arising out of the released matters.

14 5.1.4 Upon court approval of the Consent Judgment, the Parties waive their
15 respective rights to a hearing or trial on the allegations of the Complaint.

16 5.1.5 The Parties further understand and agree that, except as provided for above,
17 this release shall not extend upstream to any third parties that manufactured the Products or any
18 component parts thereof, or any distributors or suppliers who sold the Products or any component
19 parts thereof to Defendant.

20 **5.2 Defendant's Release of Brimer**

21 5.2.1 Defendant waives any and all claims against Brimer, his attorneys, and
22 other representatives for any and all actions taken or statements made (or those that could have
23 been taken or made) by Brimer and his attorneys and other representatives, whether in the course
24 of investigating claims or otherwise seeking enforcement of Proposition 65 against them in this
25 matter, and/or with respect to the Products.

26 5.2.2 Defendant also provides a general release herein which shall be effective as
27 a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
28 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Defendant of any
nature, character or kind, known or unknown, suspected or unsuspected, arising out of the subject

1 matter of the Action. Defendant acknowledges that it is familiar with Section 1542 of the
2 California Civil Code, which provides as follows:

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

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

14 **6. SEVERABILITY**

15 If, subsequent to court approval of this Consent Judgment, any of the provisions of this
16 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
17 provisions remaining shall not be adversely affected unless the Court finds that any unenforceable
18 provision is not severable from the remainder of the Consent Judgment.

19 **7. COURT APPROVAL**

20 This Consent Judgment is not effective until it is approved and entered by the Court and
21 shall be null and void if, for any reason, it is not approved and entered by the Court within nine
22 months after it has been fully executed by all Parties. In the event this consent judgment is (a)
23 not entered by this Court within nine months (or thereafter) for any reason whatsoever, or (b) is
24 entered by the Court and subsequently overturned by any appellate court, any monies that have
25 been provided to Brimer, or his counsel pursuant to Section 3 and/or Section 4 above, together
26 with interest at the prevailing federal rate accruing from the date of payment by Defendant, shall
27 be refunded within fifteen (15) days after receiving written demand from Defendant for return of
28 such funds.

1 **8. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the State of
3 California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
4 inapplicable by reason of law generally, or as to the Listed Chemical and/or the Products, then
5 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to,
6 and to the extent that, the Products are so affected.

7 **9. NOTICES**

8 When any Party is entitled to receive any notice under this Consent Judgment, the notice
9 shall be sent by certified mail and electronic mail to the person(s) identified below:

10 To Defendant:
11 Jennifer Becker
12 President
13 Empire Level Mrg. Corp.
14 929 Empire Drive
15 Mukwonago, WI 53149

16 With copy to:
17 James Robert Maxwell, Esq.
18 Rogers Joseph O'Donnell
19 311 California Street
20 San Francisco, CA 94104

21 To Brimer:
22 The Chanler Group
23 Attn: Proposition 65 Coordinator
24 2560 Ninth Street
25 Parker Plaza, Suite 214
26 Berkeley, CA 94710-2565

27 Any Party may modify the person and address to whom the notice is to be sent by sending
28 each other Party notice by certified mail and/or other verifiable form of written communication.

29 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

30 Brimer agrees to comply with the reporting form requirements referenced, in California
31 Health & Safety Code §25249.7(f) and to file a motion for approval of this Consent Judgment.

1 **11. MODIFICATION**

2 This Consent Judgment may be modified only: (1) by written agreement of the Parties; or
3 (2) upon a successful motion of any party and entry of a modified Consent Judgment by the
4 Court.

5 **12. ADDITIONAL POST-EXECUTION ACTIVITIES**

6 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed
7 motion is required to obtain judicial approval of this Consent Judgment. In furtherance of
8 obtaining such approval, Brimer and Defendant and their respective counsel agree to mutually
9 employ their best efforts to support the entry of this agreement as a Consent Judgment and obtain
10 approval of the Consent Judgment by the Court in a timely manner.

11 **13. ENTIRE AGREEMENT**

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

18 **14. ATTORNEY'S FEES**

19 14.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
20 Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs
21 unless the unsuccessful Party has acted with substantial justification. For purposes of this
22 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
23 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, et seq.

24 14.2 Except as specifically provided in the above paragraph and in Section 4.1 above,
25 each Party shall bear its own costs and attorney's fees in connection with this action.

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1 **15. COUNTERPARTS, FACSIMILE SIGNATURES**

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

5 **16. AUTHORIZATION**


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

9 **AGREED TO:**

10 Date: 9-14-10

AGREED TO:

Date: 9/13/2010

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12
13 By: 
Plaintiff Russell Brimer

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15 By: 
Joe Kubacki
Empire Level Mfg. Corp.

16 **IT IS SO ORDERED.**

17 Dated: _____

18 By _____
19 Judge of the Superior Court

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