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18 G&S METAL PRODUCTS CO., INC.

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

16 RUSSELL BRIMER,

17 Plaintiff,

18 v.
19

20 G&S METAL PRODUCTS CO., INC.
21 and DOES 1-600, inclusive,

22 Defendants.

Case No. CGC-10-498319

**CONSENT TO JUDGMENT AS TO
DEFENDANT G&S METAL PRODUCTS
CO., INC.**

(Cal. Health & Safety Code § 25249.6 et seq.)

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Consent To Judgment is entered into by and between Plaintiff Russell Brimer
4 ("Brimer" or "Plaintiff") and Defendant G&S Metal Products Co., Inc. ("G&S" or "Defendant"),
5 with Brimer and G&S 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 For purposes of this Settlement and Consent To Judgement, G&S agrees that G&S
12 employs 10 or more persons and is a person in the course of doing business for purposes of the
13 Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§
14 25249.6 *et seq.* ("Proposition 65").

15 **1.4 General Allegations**

16 Brimer alleges that G&S manufactured, distributed and/or sold, in the State of California,
17 EZ Handy Helpers Twist Tie vinyl-coated wire containing lead that exposed users to such lead,
18 without first providing "clear and reasonable warning" under Proposition 65. Lead is listed as a
19 reproductive and developmental toxicant pursuant to Proposition 65 and is referred to hereinafter
20 as the "Listed Chemical."

21 **1.5 Notice of Violation**

22 On December 15, 2009, Brimer served G&S and various public enforcement agencies
23 with a document entitled "60-Day Notice of Violation" ("Notice") that provided public enforcers
24 and these entities with notice of alleged violations of Health & Safety Code § 25249.6 for failing
25 to warn consumers of the presence of lead, a toxic chemical found in their vinyl-coated twist tie
26 wire product sold in California. To the best of the Parties' knowledge, no public enforcer has
27 commenced and is diligently prosecuting the allegations set forth in the Notice.

28 **1.6 Complaint/Amended Complaints**

1 On April 2, 2010, Brimer, acting, in the interest of the general public in California, filed a
2 Complaint in the Superior Court in and for the City and County of San Francisco, alleging
3 violations by various Defendants of Health & Safety Code § 25249.6 based, *inter alia*, on the
4 alleged exposures to lead contained in the vinyl-coated wire of EZ Handy Helpers Twist Ties (the
5 "Action"). On or about June 17, 2010, G&S appeared in this Action by Answer.

6 **1.7 No Admission**

7 This Consent To Judgment resolves claims that are denied and disputed by G&S. The
8 Parties enter into this Consent To Judgment pursuant to a full and final settlement of any and all
9 claims arising out of the Complaint in this action between the Parties for the purpose of avoiding
10 prolonged litigation. G&S denies the material factual and legal allegations contained in the
11 Notice and Action, maintains that it did not knowingly or intentionally expose California
12 consumers to lead through the reasonably foreseeable use of Products or otherwise contends that
13 all products it has manufactured, distributed and/or sold in California have been and are in
14 compliance with all applicable laws. Nothing in this Consent To Judgment shall be construed as
15 an admission by G&S of any fact, finding, issue of law, or violation of law; nor shall compliance
16 with this Consent To Judgment constitute or be construed as an admission by G&S of any fact,
17 finding, conclusion, issue of law, or violation of law, such being specifically denied by G&S.
18 However, notwithstanding the foregoing, this section shall not diminish or otherwise affect
19 G&S's obligations, responsibilities, and duties under this Consent To Judgment.

20 **1.8 Consent to Jurisdiction**

21 For purposes of this Consent To Judgment only, the Parties stipulate that this Court has
22 jurisdiction over G&S as to the allegations contained in the Complaint, that venue is proper in the
23 City and County of San Francisco, and that this Court has jurisdiction to enter and enforce the
24 provisions of this Consent To Judgment. As an express part of this Agreement, pursuant to
25 C.C.P. §664.6 the Court in which this action was filed shall retain jurisdiction over the parties to
26 enforce the settlement until performance in full of the terms of the settlement.

1 **2. DEFINITIONS**

2 **2.1** The term "Complaint" shall mean the Complaint filed by Brimer.

3 **2.2** The term "Covered Products" means all EZ Handy Helper Twist Ties made with
4 vinyl or other surface coating containing lead.

5 **2.3** The term "Effective Date" shall mean January 31, 2011.

6 **3. INJUNCTIVE RELIEF**

7 **3.1 Formulation Commitment**

8 3.1.1 As of the Effective Date, G&S shall not sell or cause to be sold in
9 California, or ship or cause to be shipped either to California, or elsewhere for sale in California,
10 any Covered Products that are not Lead Free without including a clear and reasonable Proposition
11 65 warning with each product.

12 3.1.2 For purposes of this Consent To Judgment, "Lead Free" Products shall
13 mean Products containing components that may be handled, touched or mouthed by a consumer,
14 and which components yield less than 1.0 microgram of lead when subject to a wipe test pursuant
15 to NIOSH Test Method 9100, and which components yield less than 300 parts per million
16 ("ppm") lead when analyzed pursuant to EPA testing methodologies 3050B and 6010B, or
17 equivalent methodologies utilized by federal or state agencies for the purpose of determining lead
18 content in a solid substance.

19 3.1.3 The obligation to include a clear and reasonable warning under Section
20 3.1.1 shall mean to include, as part of the permanent product container or packaging with each
21 such individual Product, the following Proposition 65 warning:

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

24 Such warning language shall be placed on the individual Covered Product packaging or container,
25 and shall be prominently placed with such conspicuousness as compared with other words,
26 statements, designs or devices as to render it likely to be read and understood by an ordinary
27 individual under customary conditions of purchase-or use.

1 **3.2 Previously-Distributed Lead Products.**

2 3.2.1 Within ten (10) days of the Effective Date, G&S shall send a letter or
3 electronic communication, which letter or electronic communication shall include a request for
4 receipt of delivery, to each customer in California to which it supplied, either during the one year
5 period prior to the December 15, 2009, Notice of Violation, or anytime thereafter, any Covered
6 Products that were/are not Lead Free, requesting that the customer either provide Proposition 65
7 warnings for such Covered Product(s) remaining in its inventory, or return any such Covered
8 Product(s) to G&S at no cost to the customer.

9 3.2.2 If G&S elects to instruct the customer to provide a Proposition 65 warning,
10 it shall include in the letter a sufficient number of warning stickers, of appropriate size and shape
11 to become affixed to the Product container or packaging of each individual unit of Covered
12 Product available for sale, containing the following language:

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

15 with instructions that the stickers be placed on the product packaging for those Covered Products
16 in such customer's inventory, and shall be prominently placed with such conspicuousness as
17 compared with other words, statements, designs or devices as to render it likely to be read and
18 understood by an ordinary individual under customary conditions of purchase-or use.

19 G&S, within thirty (30) days of the Effective Date, shall provide notice to Brimer of its
20 compliance with this Section 3.2 and include a copy of all customer correspondence pursuant to
21 Section 3.2 with such notice, shall maintain records of such compliance for three (3) years from
22 the date of compliance, and shall produce additional copies of such records upon written request
23 by Brimer.

24 **4. MONETARY PAYMENTS**

25 **4.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

26 Subject to the potential offsets described in Section 4.2 below, G&S shall pay a total of
27 \$12,000.00 in civil penalties to be apportioned in accordance with California Health & Safety
28 Code §25192, with 75% of these funds remitted to the State of California's Office of

1 Environmental Health Hazard Assessment and the remaining 25% of these penalty monies
2 remitted to Brimer as provided by California Health & Safety Code §25249.12(d).

3 G&S shall issue two separate checks for this penalty payment: (a) one check made
4 payable to The Chanler Group in Trust for the State of California's Office of Environmental
5 Health Hazard Assessment ("The Chanler Group in Trust for OEHHA") in the amount of
6 \$9,000.00 for 75% of the total penalty required and (b) one check to "The Chanler Group in Trust
7 for R. Brimer" in the amount of \$3,000.00 for the remaining 25% of the total penalty required.

8 Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to
9 OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486). The second 1099 shall be
10 issued to Brimer, whose address and tax identification number shall be furnished, upon request, at
11 least five calendar days before payment is due. The payments shall be delivered on or before
12 thirty (30) days after the Effective Date, at the following address:

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

16 **4.2 Reduction in Penalty Payments**

17 G&S may reduce the total penalty payment due pursuant to section 4.1 above by means of
18 notifying Brimer's counsel in writing, within twenty calendar days following the Effective Date,
19 of its election to exercise any or all of the following penalty offset options (in which event the
20 division of remaining total penalties due shall be proportioned between OEHHA and Brimer in
21 the same ratio as set forth in section 4.1 above):

22 (a) a 30% reduction in the total penalty amount (\$3,600.00) due under section 4.1
23 above shall be realized if G&S agrees that, no later than thirty (30) days after the Effective Date,
24 G&S shall not sell, ship, or offer to be shipped for sale in California any Covered Product made
25 with any component part or material that contains more than 100 parts per million ("ppm") of
26 lead;

27 (b) another 10% reduction in the total penalty amount (\$2,400.00) due under
28 section 4.1 above shall be realized if G&S agrees that, no later than thirty (30) days after the

Effective Date, the term "in California" in section 3.1 above shall be deemed to have been replaced by the term "within the United States."

5. REIMBURSEMENT OF FEES AND COSTS

5.1 Attorney Fees and Costs

5.1.1 The Parties reached an accord on the compensation due to Brimer and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure (CCP) §1021.5, for all work performed through the mutual execution of this agreement and approval of the Consent To Judgment by the trial court, excluding any fees on appeal. G&S shall pay Brimer and his counsel a total of \$43,000.00 as compromise reimbursement of a portion of the fees and costs incurred by Brimer and his counsel as a result of investigating, bringing this matter to G&S's attention, litigating, negotiating and securing the entry of a Consent To Judgment in the public interest.

5.1.2 G&S' payment of \$43,000 for reimbursement of fees and costs is expressly conditioned upon local California counsel for G&S preparing and filing (after plaintiff review and approval) and serving all of the motion papers necessary to secure a Court order approving this Consent to Judgment as well as the entry of Judgment thereon (with the express exception of plaintiff's attorney declaration necessary to support the compromised fee and cost reimbursement). If G&S does not file and serve a motion for order approving this Proposition 65 settlement and for entry of judgment within seven (7) days of receipt of plaintiff's counsel declaration supporting the fee and cost reimbursement, then plaintiff's counsel shall have the right to complete and file such motion and G&S shall be required to pay an additional \$5,000 to plaintiff and his counsel as further attorney fee and cost reimbursement for the motion to approve process.

5.1.3 Payment of the amount due pursuant to section 5.1.1 shall be delivered to Brimer's counsel on or before thirty (30) days after the Effective Date, at the following address:

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

1 All payments under Sections 4 and this Section shall be held in trust by The
2 Chanler Group pending approval of the settlement and entry of Judgment. If for any
3 reason this settlement is not approved or Judgment is not entered upon this agreement, The
4 Chanler Group will return such payment to the defendant, care of counsel identified
5 herein, within thirty (30) days of such determination that this settlement is not approved or
6 Judgment is not entered upon this agreement.

7 **6. CLAIMS COVERED AND RELEASE**

8 **6.1 Brimer's Releases of G&S and Related Entities**

9 6.1.1 This Consent To Judgment is a full, final, and binding resolution between
10 Brimer and G&S, and G&S's owners, subsidiaries, affiliates, sister and related companies
11 (including those overseas entities held by its owners which manufactured or supplied the Covered
12 Products to G&S), employees, shareholders, directors, insurers, attorneys, successors, and assigns
13 ("Defendant Releasees"), and all entities to whom G&S directly or indirectly distributes or sells
14 Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
15 franchisees, cooperative members, and licensees ("Downstream Defendant Releasees") of any
16 violation of Proposition 65 that has been or could have been asserted against Defendant Releasees
17 and Downstream Defendant Releasees regarding the failure to warn about exposure to the Listed
18 Chemical arising in connection with Covered Products manufactured, sourced, distributed, or sold
19 by Defendant Releasees prior to the Effective Date. G&S's compliance with this Consent To
20 Judgment shall constitute compliance with Proposition 65 with respect to the Listed Chemical in
21 the Covered Products after the Effective Date.

22 6.1.2 Brimer on behalf of himself, his past and current agents, representatives,
23 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives
24 with respect to Covered Products all rights to institute or participate in, directly or indirectly, any
25 form of legal action and releases all claims, including, without limitation, all actions, and causes
26 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
27 penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and
28 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent

1 (collectively "claims"), against Defendant Releasees and Downstream Defendant Releasees that
2 arise under Proposition 65 or any other statutory or common law claims that were or could have
3 been asserted in the public interest, as such claims relate to Defendant Releasees' and
4 Downstream Defendant Releasees' alleged failure to warn about exposures to the Listed Chemical
5 contained in the Covered Products.

6 6.1.3 Brimer also, in his individual capacity only and *not* in his representative
7 capacity, provides a general release herein which shall be effective as a full and final accord and
8 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
9 damages, losses, claims, liabilities and demands of Brimer of any nature, character or kind,
10 known or unknown, suspected or unsuspected, arising out of the subject matter of the Complaint
11 as to Covered Products manufactured, distributed or sold by Defendant Releasees. Brimer
12 acknowledges that he is familiar with Section 1542 of the California Civil Code, which provides
13 as follows:

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

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

25 6.1.4 Upon court approval of the Consent To Judgment, the Parties waive their
26 respective rights to a hearing or trial on the allegations of the Complaint.

27 **6.2 G&S's Release of Brimer**
28

1 6.2.1 Except as to the provisions of Section 5, G&S waives any and all claims
2 against Brimer, his attorneys, and other representatives for any and all actions taken or statements
3 made (or those that could have been taken or made) by Brimer and his attorneys and other
4 representatives, whether in the course of investigating claims or otherwise seeking enforcement of
5 Proposition 65 against it in this matter, and/or with respect to the Covered Products.

6 6.2.2 Except as to the provisions of Section 5, G&S also provides a general
7 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
8 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
9 liabilities and demands of G&S of any nature, character or kind, known or unknown, suspected or
10 unsuspected, arising out of the subject matter of the Action. G&S acknowledges that it is familiar
11 with Section 1542 of the California Civil Code, which provides as follows:

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

15 G&S expressly waives and relinquishes any and all rights and benefits which it
16 may have under, or which may be conferred on it by the provisions of Section 1542 of the
17 California Civil Code as well as under any other state or federal statute or common law
18 principle of similar effect, to the fullest extent that it may lawfully waive such rights or
19 benefits pertaining to the released matters. In furtherance of such intention, the release
20 hereby given shall be and remain in effect as a full and complete release notwithstanding
21 the discovery or existence of any such additional or different claims or facts arising out of
22 the released matters.

23 **7. SEVERABILITY**

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

28

1 **8. COURT APPROVAL**

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

5 **9. GOVERNING LAW**

6 The terms of this Consent To Judgment shall be governed by the laws of the State of
7 California.

8 **10. NOTICES**

9 When any Party is entitled to receive any notice under this Consent To Judgment, the
10 notice shall be sent by certified mail and electronic mail to the following:

11 For G&S to:

12 Mark Schwartz, President
13 G&S Metal Products Co., Inc.
14 3330 East 79th Street
15 Cleveland, OH 44127

16 With copy to its counsel at

17 Eric L. Zalud, Esq.
18 Benesch Friedlander Coplan Aranoff, LLP
19 200 Public Square, Suite 2300
20 Cleveland, OH 44114

21 and

22 For Brimer to:

23 Proposition 65 Coordinator
24 The Chanler Group
25 2560 Ninth Street
26 Parker Plaza, Suite 214
27 Berkeley, CA 94710-2565

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

11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)

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

1 **12. MODIFICATION**

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

5 **13. 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 To Judgment. In furtherance of
8 obtaining such approval, Brimer and G&S and their respective counsel agree to mutually employ
9 their best efforts to support the entry of this agreement as a Consent To Judgment and obtain
10 approval of the Consent To Judgment - sufficient to render a formal judgment approving this
11 agreement - by the Court in a timely manner. Any effort by G&S or Brimer to impede judicial
12 approval of this Consent To Judgment shall subject G&S or Brimer to liability for attorney fees
13 and costs incurred by G&S or Brimer or their counsel in their efforts to meet or oppose either
14 party's impeding conduct.

15 **14. ENTIRE AGREEMENT**

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

22 **15. ATTORNEY'S FEES**

23 **15.1** A Party who unsuccessfully brings or contests an action arising out of this Consent
24 To Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs
25 unless the unsuccessful Party has acted with substantial justification. For purposes of this
26 Consent To Judgment, the term substantial justification shall carry the same meaning as used in
27 the Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, et seq.

28

1 15.2 Except as specifically provided in the above paragraph and in Section 5.1, each
2 Party shall bear its own costs and attorney's fees in connection with this action.

3 15.3 Nothing in this Section 15 shall preclude a Party from seeking an award of
4 sanctions pursuant to law.

5 16. COUNTERPARTS, FACSIMILE SIGNATURES

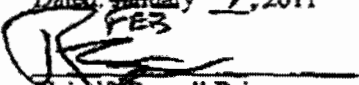
6 This Consent To Judgment may be executed in counterparts and by facsimile or portable
7 document format (PDF), each of which shall be deemed an original, and all of which, when taken
8 together, shall constitute one and the same documents.

9 17. AUTHORIZATION

10 The undersigned parties and their counsel are authorized to execute this Consent To
11 Judgment on behalf of their respective Parties and have read, understood, and agree to all of the
12 terms and conditions of this Consent To Judgment.

13 IT IS SO AGREED

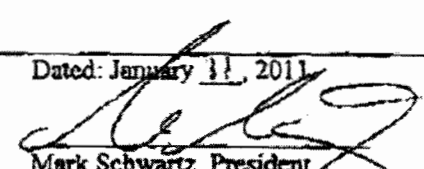
14 Dated: January 7, 2011
15 FEB

16 
17 Plaintiff Russell Brimer

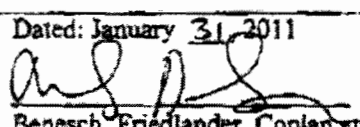
Dated: January 9, 2011
FEB

18 
19 The Chanler Group
20 Attorneys for
21 Plaintiff Russell Brimer

22 Dated: January 11, 2011

23 
24 Mark Schwartz, President
25 President G&S Metal Products Co., Inc.

Dated: January 31, 2011

26 
27 Benesch, Friedlander, Coplan and
28 Aranoff LLP
Attorneys for
Defendant G&S Metal Products Co., Inc.