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Christopher M. Martin, State Bar No. 186021
THE CHANLER GROUP
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Attorneys for Plaintiff
RUSSELL BRIMER

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

RUSSELL BRIMER,

Plaintiff,

v.

GIFTCRAFT, INC.; and DOES 1 through 150,

Defendants.

) Case No. RG10551579
)
) **PROPOSED 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 Giftcraft, Inc., (“Giftcraft” or “Defendant”), with Plaintiff and Defendant
5 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, glass rain gauges with colored artwork or designs on the exterior that expose users to
17 lead, without first providing “clear and reasonable warning” under Proposition 65. Lead is listed
18 as a reproductive and developmental toxicant pursuant to Proposition 65 and is referred to
19 hereinafter as the “Listed Chemical.”

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as follows: glass rain
22 gauges with colored artwork or designs on the exterior manufactured by Ahead Industrial
23 Corporation and imported and sold by Giftcraft in California, such as *Rain Gauge, Owl, #14072*.
24 All such items are referred to herein as “Products.”

25 **1.6 Notice of Violation**

26 On August 5, 2010, Brimer served Defendant and various public enforcement agencies
27 with a document entitled “60-Day Notice of Violation” that provided public enforcers and
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1 Defendant with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn
2 consumers that glass rain gauges with colored artwork or designs on the exterior that Defendant
3 distributed and/or sold exposed users in California to lead.

4 **1.7 Complaint**

5 On December 15, 2010, Brimer, acting in the interest of the general public in California,
6 filed a complaint in the Superior Court for the County of Alameda, alleging violations of Health
7 & Safety Code § 25249.6 based on the alleged exposures to lead contained in glass rain gauges
8 with colored artwork or designs on the exterior distributed and/or sold by Defendant. This action
9 shall hereinafter be referred to as the “Action.”

10 **1.8 No Admission**

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

22 **1.9 Consent to Jurisdiction**

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

1 1.10 **Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean April 30,
3 2011.

4 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

5 2.1 **Reformulation Commitment**

6 As of the Effective Date, Giftcraft shall cease all sales of the Products in California or
7 shall only distribute or sell in California, or cause to be distributed for sale in California, Products
8 that are Lead Free as defined below. For purposes of this Consent Judgment, “Lead Free”
9 Products shall mean Products containing components that may be handled, touched or mouthed
10 by a consumer, and which components yield less than 1.0 microgram of lead when using a wipe
11 test pursuant to NIOSH Test Method 9100, and yield less than 100 parts per million (“ppm”) lead
12 when analyzed pursuant to EPA testing methodologies 3050B and 6010B, or equivalent
13 methodologies utilized by federal or state agencies for the purpose of determining lead content in
14 a solid substance. Products that are Lead Free are referred to hereinafter as “Reformulated
15 Products.”

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

17 **3.1 Civil Penalty.** Giftcraft shall make a civil penalty payment of \$2,000 to be
18 apportioned in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with
19 75% of these funds remitted to the State of California’s Office of Environmental Health Hazard
20 Assessment and the remaining 25% of these penalty monies remitted to Russell Brimer, as
21 provided by California Health & Safety Code § 25249.12(d). Giftcraft shall issue two separate
22 checks for the penalty payment: (a) one check made payable to “The Chanler Group in Trust For
23 the Office of Environmental Health Hazard Assessment” in the amount of \$1,500, representing
24 75% of the total penalty; and (b) one check to “The Chanler Group in Trust for Russell Brimer”
25 in the amount of \$500, representing 25% of the total penalty. Two separate 1099s shall be
26 issued for the above payments. The first 1099 shall be issued to the Office of Environmental
27 Health Hazard Assessment, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486) in the

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1 amount of \$1,500. The second 1099 shall be issued to Russell Brimer in the amount of \$500,
2 whose address and tax identification number shall be furnished, upon request, at least five (5)
3 calendar days before the payment is due. The payments shall be delivered to Brimer's counsel
4 on or before May 27, 2011, at the following address:

5
6 The Chanler Group
7 Attn: Proposition 65 Controller
8 2560 Ninth Street
9 Parker Plaza, Suite 214
10 Berkeley, CA 94710

11 **4. REIMBURSEMENT OF FEES AND COSTS**

12 **4.1 Attorney Fees and Costs**

13 4.1.1 The parties acknowledge that Brimer and his counsel offered to resolve this
14 dispute without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving
15 this fee issue to be resolved until after the other material terms of the agreement had been settled.
16 The Parties then attempted to (and did) reach an accord on the compensation due to Brimer and
17 his counsel under general contract principles and the private attorney general doctrine codified at
18 California Code of Civil Procedure (CCP) §1021.5, for all work performed through the mutual
19 execution of this agreement. Giftcraft shall reimburse Brimer and his counsel \$23,000 for fees
20 and costs incurred as a result of investigating and bringing this matter to its attention, and
21 negotiating a settlement in the public interest. This figure includes Brimer's future fees and costs,
22 including attorney's fees, to be incurred in seeking judicial approval of this Consent Judgment as
23 well as any other legal work performed after the execution of this Consent Judgment incurred in
24 an effort to obtain finality of the case. However, in the event a third party were to appeal entry of
25 this Consent Judgment, Brimer and his counsel shall be entitled to seek their reasonable
26 attorney's fees and costs associated with all appellate work defending the entry of judgment
27 pursuant to CCP §1021.5.

28 The payment shall be made payable to "The Chanler Group" and shall be delivered on or
before May 27, 2011, to the following address:

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

6 A separate 1099 shall be issued to "The Chanler Group" (EIN: 94-3171522) for
7 the amount of the reimbursement of Plaintiff's fees and costs.

8 **5. CLAIMS COVERED AND RELEASED**

9 5.1 **Full, Final and Binding Resolution of Proposition 65 Allegations.** This
10 Consent Judgment is a full, final and binding resolution between Plaintiff on behalf of himself
11 and the public interest and Defendant of any violation of Proposition 65 that was or could have
12 been asserted by Plaintiff against Defendant, its parents, subsidiaries, affiliated entities that are
13 under common ownership, directors, officers, employees, attorneys, and each entity to whom
14 Defendant and directly or indirectly distribute or sell Products, including but not limited to
15 downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members,
16 licensors, and licensees ("Releasees"), based on their failure to warn about alleged exposures to
17 the Listed Chemical contained in the Products that were sold by Defendant.

18 5.2 **Plaintiff's Public Release of Proposition 65 Claims.** In further
19 consideration of the promises and agreements herein contained, Plaintiff on behalf of himself,
20 his past and current agents, representatives, attorneys, successors, and/or assignees, and in the
21 interest of the general public, hereby waives all rights to institute or participate in, directly or
22 indirectly, any form of legal action and releases all claims, including, without limitation, all
23 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
24 damages, costs, fines, penalties, losses, or expenses -- including, but not limited to, investigation
25 fees, expert fees, and attorneys' fees, but exclusive of fees and costs on appeal -- limited to and
26 arising under Proposition 65 with respect to the Listed Chemical in the Products sold by
27 Defendant (collectively "claims"), against Defendant, Defendant Releasees, and Downstream
28 Defendant Releasees.

1 5.3 **Plaintiff's Individual Release of Claims.** Plaintiff also, in his individual
2 capacity only and *not* in his representative capacity, provides a release herein which shall be
3 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
4 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
5 plaintiff of any nature, character or kind, whether known or unknown, suspected or unsuspected,
6 limited to and arising out of alleged or actual exposures to the Listed Chemical in the Products
7 manufactured, distributed or sold by Defendant.

8 5.4 **Defendant's Release of Plaintiff.** Defendant on behalf of itself, its past and
9 current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and
10 all claims against Plaintiff, his attorneys and other representatives, for any and all actions taken
11 or statements made (or those that could have been taken or made) by Plaintiff and his attorneys
12 and other representatives, whether in the course of investigating claims or otherwise seeking to
13 enforce Proposition 65 against it in this matter with respect to the Products.

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
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1 such funds.

2 **8. GOVERNING LAW**

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

8 **9. NOTICES**

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

11 To Defendant:
12 Trevor Cohen, President
13 Giftcraft, Inc.
14 300 International Drive, Suite 100
Williamsville, NY 14221

15 With copy to:
16 Steven J. Ricca, Esq.
17 Jaeckle Fleischmann & Mugel, LLP
12 Fountain Plaza, Suite 800
18 Buffalo, New York 14202-2292

19 To Brimer:
20 The Chanler Group
Attn: Proposition 65 Coordinator
21 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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

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

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

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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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15. COUNTERPARTS, FACSIMILE SIGNATURES

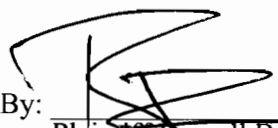
This Consent Judgment may be executed in counterparts and by facsimile or portable document format (PDF), each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same documents.

16. AUTHORIZATION

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

AGREED TO:

Date: 5-12-11

By: 
Plaintiff Russell Brimer

AGREED TO:

Date: _____

By: _____
Trevor Cohen, President
Giftcraft, Inc.

IT IS SO ORDERED.

Dated: _____

By _____
Judge of the Superior Court

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15. COUNTERPARTS, FACSIMILE SIGNATURES

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16. AUTHORIZATION

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


AGREED TO:

AGREED TO:

Date: _____

Date: _____

By: _____
Plaintiff Russell Brimer

By: _____

Trevor Cohen, President
Giftcraft, Inc.

IT IS SO ORDERED.

Dated: _____

By _____
Judge of the Superior Court