

1 Clifford A. Chanler, State Bar No. 135534
Jennifer Henry, State Bar No. 208221
2 THE CHANLER GROUP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, California 94710-2565
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
6 RUSSELL BRIMER

ENDORSED
FILED
ALAMEDA COUNTY

MAR 18 2011 A

CLERK OF THE SUPERIOR COURT
By AN Kanae, Deputy

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF ALAMEDA
10 UNLIMITED CIVIL JURISDICTION
11

12 RUSSELL BRIMER,

13 Plaintiff,

14 v.

15 SBI INCORPORATED; SCHROEDER &
16 TREMAYNE, INC.; and DOES 2-150, inclusive,

17 Defendants.
18
19
20

Case No. RG10539656

**[PROPOSED] JUDGMENT
PURSUANT TO TERMS OF
PROPOSITION 65 SETTLEMENT**

Date: March 18, 2011

Time: 10:00 a.m.

Dept.: 18

Judge: Hon. Marshal Whitley

Action Filed: September 24, 2010

Reservation No. R-1145415

1 In the above-entitled action, Plaintiff RUSSELL BRIMER and Defendant SBI
2 INCORPORATED, having agreed through their respective counsel that a judgment be entered
3 pursuant to the terms of the Consent Judgment entered into by the parties in resolution of this
4 Proposition 65 action, and following the issuance of an order approving the Parties' settlement
5 agreement on 3/18, 2010.

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Health & Safety
7 Code § 25249.7(f)(4) and Code of Civil Procedure § 664.6, judgment is hereby entered in accordance
8 with the terms of the Consent Judgment attached hereto as Exhibit 1. By stipulation of the parties,
9 the Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure § 664.6.

10
11 **IT IS SO ORDERED.**

12
13 Dated: 3/18/11

14 **MARSHALL I. WHITLEY**
15 _____
16 JUDGE OF THE SUPERIOR COURT

Exhibit 1

1 Clifford A. Chanler, State Bar No. 135534
2 Josh Voorhees, State Bar No. 241436
3 Jennifer Henry, State Bar No. 208221
4 THE CHANLER GROUP
5 2560 Ninth Street
6 Parker Plaza, Suite 214
7 Berkeley, CA 94710-2565
8 Telephone: (510) 848-8880
9 Facsimile: (510) 848-8118

10 Attorneys for Plaintiff
11 RUSSELL BRIMER

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

16 RUSSELL BRIMER,

17 Plaintiff,

18 v.

19 SBI INCORPORATED; SCHROEDER &
20 TREMAYNE, INC.; and DOES 1-150,
21 inclusive,

22 Defendants.

Case No. **RG10539656**

[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 Defendants SBI Incorporated and Schroeder & Tremayne, Inc. ("SBI" or
5 "Defendant"), with 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 contends he seeks to
8 promote awareness of exposure to toxic chemicals and to improve human health by reducing or
9 eliminating hazardous substances contained in consumer products.

10 **1.3 SBI**

11 SBI 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 SBI has manufactured, distributed and/or sold in the State of
16 California watering gun/nozzles with grips containing lead (hereinafter the "Listed Chemical"),
17 without the requisite Proposition 65 warnings. The Listed Chemical is on the Proposition 65 list
18 as a chemical known by the State of California to cause birth defects and other reproductive harm.
19 SBI alleges that since at least February, 2010, it has not shipped, sold or offered to be shipped for
20 sale in California any watering gun/nozzles with grips containing lead in violation of Proposition
21 65.

22 **1.5 Product Description**

23 The products that are covered by this Consent Judgment are defined, as follows: watering
24 gun/nozzles with grips containing the Listed Chemical including, but not limited to, the *Viking*
25 *Heavy Duty Spray Nozzle, 999000 (#0 75182 09990 6)*. All such watering gun/nozzles with grips
26 containing the Listed Chemical shall be referred to hereinafter as the "Products."

27 **1.6 Notices of Violation**

28 On or about June 17, 2010, Brimer served SBI and various public enforcement agencies

1 with a document entitled "60-Day Notice of Violation" (the "Notice") that provided SBI and such
2 public enforcers with notice of alleged violations of California Health & Safety Code § 25249.6
3 for failing to warn consumers that the Products exposed users in California to the Listed
4 Chemical. To the best of the Parties' knowledge, no public enforcer has diligently prosecuted the
5 allegations set forth in the Notice.

6 **1.7 Complaint**

7 On or about September 24, 2010, Brimer, who was and is acting in the interest of the
8 general public in California, filed the instant action in the Superior Court for the County of
9 Alameda, alleging violations of Health & Safety Code § 25249.6 based on the exposures to lead
10 contained in the Products manufactured, distributed and/or sold by SBI ("Complaint").

11 **1.8 No Admission**

12 SBI denies the material, factual, and legal allegations contained in Brimer's Notice.
13 Nothing in this Settlement Agreement shall be construed as an admission by SBI of any fact,
14 finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement
15 constitute or be construed as an admission by SBI of any fact, finding, conclusion, issue of law, or
16 violation of law, such being specifically denied by SBI. However, this section shall not diminish
17 or otherwise affect the obligations, responsibilities and duties of SBI under this Settlement
18 Agreement.

19 **1.9 Consent to Jurisdiction**

20 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
21 jurisdiction over SBI as to the allegations contained in the Complaint, that venue is proper in the
22 County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of this
23 Consent Judgment pursuant to California Code of Civil Procedure § 664.6.

24 **1.10 Full and Final Settlement**

25 The Parties enter into this Consent Judgment as a full and final settlement of any and all
26 claims either may have regarding the allegations contained in the Complaint. However, this
27 Section shall not diminish or otherwise affect the Parties' obligations, responsibilities, and/or
28 duties under this Consent Judgment.

1 **1.11 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean December
3 20, 2010.

4 **2. INJUNCTIVE RELIEF**

5 **2.1 Reformulation Commitment**

6 Commencing on the Effective Date, SBI shall not ship, sell or offer to be shipped for sale
7 in California any Products unless such Product is “Lead Free,” as provided in Section 2.2 below.
8 For purposes of this Agreement, “Lead Free” products shall mean Products that meet the
9 Reformulation Standards of Section 2.2 below, and such Products are referred to herein as
10 “Reformulated Products.”

11 **2.2 Reformulation Standards**

12 Reformulated Products are defined as those Products containing components that may be
13 handled, touched or mouthed by a consumer, which components yield less than 1.0 micrograms of
14 lead when using a wipe test pursuant to NIOSH Test Method 9100, and yield less than or equal to
15 100 parts per million (“ppm”) of lead when analyzed pursuant to Environmental Protection
16 Agency (“EPA”) testing methodologies 3050B and/or 6010B, or another method of detection and
17 analysis for lead authorized under Title 27 California Code of Regulations (“CCR”) § 25900.

18 **3. MONETARY PAYMENTS**

19 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

20 Pursuant to Health & Safety Code § 25249.7(b), and in settlement of all claims related to
21 the Products and the Listed Chemical referred to herein, SBI shall pay \$11,500 in civil penalties
22 to be apportioned in accordance with California Health & Safety Code § 25249.12, with 75% of
23 these funds remitted to the State of California’s Office of Environmental Health Hazard
24 Assessment (“OEHHA”) and the remaining 25% of the penalty amount remitted to Brimer as
25 provided by California Health & Safety Code §25249.12(c) and (d).

26 SBI shall issue two separate checks for each of the penalty payments: (a) one check
27 made payable to The Chanler Group in Trust for the State of California’s Office of
28 Environmental Health Hazard Assessment (“The Chanler Group in Trust for OEHHA”) in the

1 amount of \$8,625, representing 75% of the total penalty; and (b) one check to The Chanler
2 Group in Trust for Brimer in the amount of \$2,875, representing 25% of the total penalty. Two
3 separate 1099s shall be issued for the above payments: The first 1099 shall be issued to the
4 Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95184
5 (EIN: 68-0284486) in the amount of \$8,625. The second 1099 shall be issued to Brimer in the
6 amount of \$2,875, whose address and tax identification number shall be furnished, upon
7 request, three calendar days before payment is due. The payment shall be made payable to The
8 Chanler Group and shall be delivered on or before December 30, 2010, at the following
9 address:

10 The Chanler Group
11 Attn: Proposition 65 Controller
12 2560 Ninth Street
13 Parker Plaza, Suite 214
14 Berkeley, CA 94710-2565

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

14 **4.1 Attorney Fees and Costs**

15 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
16 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
17 this fee issue to be resolved after the material terms of the agreement had been settled. SBI
18 expressed a desire to resolve the fee and cost issue as part of the settlement terms to determine
19 whether a settlement could be finalized. The parties then attempted to (and did) reach an accord
20 on the compensation due to Brimer and his counsel under general contract principles and the
21 private attorney general doctrine codified at California Code of Civil Procedure (CCP) §1021.5,
22 for all work performed through the mutual execution of this agreement. SBI shall reimburse
23 Brimer and his counsel the total of \$32,000 for fees and costs incurred as a result of investigating,
24 bringing this matter to SBI's attention, and litigating and negotiating a settlement in the public
25 interest. SBI shall issue a separate 1099 for fees and costs (EIN: 94-3171522) and shall make the
26 check payable to "The Chanler Group" and shall be delivered on or before December 30, 2010, to
27 the following address:
28

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

6 **5. RELEASE OF ALL CLAIMS**

7 **5.1 Brimer's Release of Defendant**

8 In further consideration of the promises and agreements herein contained, and for the
9 payments to be made pursuant to Sections 3 and 4, Brimer, on behalf of himself, his past and
10 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
11 general public, hereby waives all rights to institute or participate in, directly or indirectly, any
12 form of legal action and releases all claims, including, without limitation, all actions, and causes
13 of action, in law or in equity, suits, liabilities, demands, obligations, damages, fines or penalties of
14 any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"),
15 against SBI and each of its downstream retailers, franchisees, dealers, customers, owners,
16 purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective
17 officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and
18 parent entities (collectively "Releasees"). It is specifically understood and agreed that the Parties
19 intend that SBI's compliance with the terms of this Settlement Agreement resolves all issues and
20 liability, now and in the future (provided that SBI complies with the terms of the Settlement
21 Agreement), concerning SBI and the SBI Releasees' compliance with the requirements of
22 Proposition 65 as to the Listed Chemical in the Products.

23 Brimer also, in his individual capacity only and *not* in his representative capacity, provides
24 a general release herein which shall be effective as a full and final accord and satisfaction, as a bar
25 to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses,
26 claims, liabilities and demands of Brimer of any nature, character or kind, known or unknown,
27 suspected or unsuspected, arising out of the subject matter of this dispute. Brimer acknowledges

28 ///

///

1 that he is familiar with Section 1452 of the California Civil Code, which provides as follows:

2 **A general release does not extend to claims which the creditor does**
3 **not know or suspect to exist in his or her favor at the time of**
4 **executing the release, which if known by him or her must have**
5 **materially affected his settlement with the debtor.**

6 Brimer, in his individual capacity only and *not* in his representative capacity, expressly
7 waives and relinquishes any and all rights and benefits which he may have under, or which may
8 be conferred on him by the provisions of Section 1452 of the California Civil Code as well as
9 under any other state or federal statute or common law principle of similar effect, to the fullest
10 extent that he may lawfully waive such rights or benefits pertaining to the released matters. In
11 furtherance of such intention, the release hereby given shall be and remain in effect as a full and
12 complete release notwithstanding the discovery or existence of any such additional or different
13 claims or facts arising out of the released matters.

14 The Parties further understand and agree that this release shall not extend upstream to any
15 entities that manufactured the Products or any component parts thereof, or any distributors or
16 suppliers who sold the Products or any component parts thereof to SBI.

17 **5.2 SBI's Release of Brimer**

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

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

27 ///

28

1 dispute. SBI acknowledges that it is familiar with Section 1452 of the California Civil Code,
2 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 or her favor at the time of**
5 **executing the release, which if known by him or her must have**
6 **materially affected his settlement with the debtor.**

7 SBI expressly waives and relinquishes any and all rights and benefits which it may have
8 under, or which may be conferred on him by the provisions of Section 1452 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
18 unenforceable 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 one
22 year after it has been fully executed by all parties, in which event any monies that have been
23 provided to Brimer, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded
24 within fifteen (15) days after receiving written notice from SBI that the one-year period has
25 expired.

26 **8. GOVERNING LAW**

27 The terms of this Settlement Agreement shall be governed by the laws of the State of
28 California and apply within the State of California. If that Proposition 65 is repealed or is

1 otherwise rendered inapplicable by reason of law generally, or as to the Products, then SBI shall
2 provide written notice to Brimer of any asserted change in the law, and shall have no further
3 obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the
4 Products are so affected.

5 **9. NOTICES**

6 Unless specified herein, all correspondence and notices required to be provided pursuant to
7 this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class,
8 (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the
9 other party at the following addresses:

10 To SBI:

11 John Wilmsen, Sr., President
12 SBI Incorporated
13 8500 Valcour Avenue
14 Saint Louis, MO 63123

15 With a copy to:

16 William D. Wick, Esq.
17 Wactor & Wick LLP
18 180 Grand Avenue, Suite 950
19 Oakland, CA 94612

20 To Brimer:

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

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

28 **10. 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 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 motion
7 is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such
8 approval, Brimer, SBI, and their respective counsel, agree to mutually employ their best efforts to
9 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
10 Judgment by the Court in a timely manner. For purposes of this paragraph, best efforts shall
11 include, at a minimum, cooperating on the drafting and filing any papers in support of the
12 required motion for judicial approval.

13 **13. ENTIRE AGREEMENT**

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

20 **14. COUNTERPARTS, FACSIMILE SIGNATURES**

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

24 ///

25 ///

26

27

28

1 **15. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties and have read, understood, and agree to all of the terms and conditions of this
4 Consent Judgment.

5 **AGREED TO:**

AGREED TO:

6 Dated: December 15, 2010

Dated: December __, 2010

7
8 
9 By: _____
Russell Brimer

By: _____, President
SBI Incorporated

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **15. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties and have read, understood, and agree to all of the terms and conditions of this
4 Consent Judgment.

5 **AGREED TO:**

AGREED TO:

6 Dated: December __, 2010

Dated: December 16, 2010

7
8 By: _____
9 Russell Brimer

By: John W. Wilson
_____, President
SBI Incorporated

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28