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ULTRA PRO CORPORATION

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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF ALAMEDA
17 UNLIMITED CIVIL JURISDICTION
18

19 RUSSELL BRIMER,
20 Plaintiff,

21 v.

22
23 ULTRA PRO CORPORATION; *et al.*,
24 Defendants.

Case No. RG10553315

**[PROPOSED] CONSENT
JUDGMENT**

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

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Ultra Pro Corporation**

3 This Consent Judgment is entered into by and between Russell Brimer (“Plaintiff or
4 “Brimer”) and Ultra Pro Corporation (“Defendant” or “Ultra Pro”), with Brimer and Ultra Pro
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 exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous
9 substances contained in consumer products.

10 **1.3 Defendant**

11 Ultra Pro 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 Ultra Pro has manufactured, distributed, and/or offered for sale or use in
16 California craft tools with vinyl grips containing lead, without providing the requisite Proposition
17 65 warnings. Lead is listed pursuant to Proposition 65 as a chemical known to the State of
18 California to cause birth defects and other reproductive harm. Lead shall be referred hereinafter as
19 the “Listed Chemical.”

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as follows: craft tools
22 with vinyl grips containing the Listed Chemical, including, without limitation, the *7gypsies 1 pc*
23 *Punch ATC, Stock #12497, (#0 74427 12497 7)* (hereinafter “Products”).

24 **1.6 Notice of Violation**

25 On or about August 5, 2010, Brimer served Ultra Pro and various public enforcement
26 agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided Ultra Pro
27 and the public enforcers with notice that Ultra Pro has allegedly violated Proposition 65 by failing
28

1 to warn its customers and consumers in California that the Products exposed users to the Listed
2 Chemical.

3 **1.7 Complaint**

4 On December 28, 2010, Brimer, who alleges that he was and is acting in the interest of the
5 general public in California, filed the instant action (“Complaint”) against Ultra Pro for the
6 violations of Proposition 65 alleged in the Notice.

7 **1.8 No Admission**

8 Ultra Pro denies the material, factual, and legal allegations contained in Brimer’s Notice and
9 Complaint and maintains that all of the products that it has sold and distributed in California,
10 including the Products, comply, and have complied, with all laws. Nothing in this Consent
11 Judgment shall be construed as an admission by Ultra Pro of any fact, finding, conclusion of law,
12 issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be
13 construed as an admission by Ultra Pro of any fact, finding, conclusion of law, issue of law, or
14 violation of law, such being specifically denied by Ultra Pro. However, this section shall not
15 diminish or otherwise affect the obligations, responsibilities and duties of Ultra Pro under this
16 Consent Judgment.

17 **1.9 Consent to Jurisdiction**

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

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term “Effective Date” shall mean June 30, 2011.

24 **2. INJUNCTIVE RELIEF: REFORMULATION**

25 **2.1 Reformulated Products**

26 Commencing on the Effective Date, Ultra Pro shall either: (a) cease all sales, shipments,
27 and/or distribution of the Products in California, or to entities which may offer the Products for sale
28 in California; or (b) only ship, sell, or offer to ship for sale in California Products that are Lead Free.

1 For purposes of this Consent Judgment, "Lead Free" shall mean Products that contain no more than
2 90 parts per million of lead when analyzed pursuant to Environmental Protection Agency testing
3 methodologies 3050B and 6010B (Digest Test) and that yield a result of no more than 1.0
4 micrograms of lead when analyzed pursuant to NIOSH Test Method 9100 (Wipe Test) performed on
5 any accessible component (i.e. any portion of the Product that may be handled, touched or mouthed
6 by a user during reasonably foreseeable use).

7 **3. MONETARY PAYMENTS**

8 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

9 Pursuant to California Health & Safety Code § 25249.7(b), and in settlement of all claims
10 alleged in the Notice and Complaint and referred to in this Consent Judgment, Ultra Pro shall pay
11 \$4,000 in civil penalties. This amount reflects a credit of \$6,000 agreed to by Brimer for Ultra
12 Pro's commitment offer only Lead Free Products pursuant to Section 2.1 above.

13 Civil penalties shall be apportioned according to Health & Safety Code §§ 25249.12 (c)(1)
14 & (d), with seventy-five percent of the penalty amount paid to the State of California's Office of
15 Environmental Health Hazard Assessment ("OEHHA") and the remaining twenty-five percent
16 remitted to Brimer.

17 Ultra Pro shall issue two checks for the penalty payment: (a) one to "The Chanler Group in
18 Trust for OEHHA" in the amount of \$3,000, and (b) one to "The Chanler Group in Trust for Russell
19 Brimer" in the amount of \$1,000. A separate 1099 forms shall be issued for each of the above
20 payments to: (a) Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento,
21 CA 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose address and tax identification
22 number shall be furnished upon request five calendar days before payment is due. Payment shall be
23 delivered to Brimer's counsel on or before July 1, 2011, at the following address:

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

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

2 **4.1 Attorney Fees and Costs**

3 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
4 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
5 issue to be resolved after the material terms of the agreement had been settled. Ultra Pro expressed
6 a desire to resolve the fee and cost issue as part of the settlement terms to determine whether a
7 settlement could be finalized. The Parties then attempted to (and did) reach an accord on the
8 compensation due to Brimer and his counsel under general contract principles and the private
9 attorney general doctrine codified at California Code of Civil Procedure §1021.5, for all work
10 performed through the mutual execution of this agreement. Ultra Pro shall pay \$28,000 for fees and
11 costs incurred as a result of investigating, bringing this matter to Ultra Pro’s attention, and litigating
12 and negotiating a settlement in the public interest.

13 Ultra Pro agrees to provide the above reimbursement of a portion of Brimer’s fees and costs
14 in five monthly installments according to the following payment schedule: (a) \$5,600 due on or
15 before July 15, 2011; (b) \$5,600 due on or before August 15, 2011; (c) \$5,600 due on or before
16 September 15, 2011; (d) \$5,600 due on or before October 15, 2011; and (e) \$5,600 due on or before
17 November 15, 2011. Each of the above payments shall be in the form of a check payable to “The
18 Chanler Group.” Ultra Pro shall issue a single 1099 for all payments made pursuant to this section
19 to The Chanler Group (EIN: 94-3171522) and deliver each payment to Brimer’s counsel at the
20 following address:

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

26 **5. CLAIMS COVERED AND RELEASED**

27 **5.1 Full, Final and Binding Resolution of Proposition 65 Allegations**

28 This Consent Judgment is a full, final and binding resolution between Brimer, on behalf of
himself and the public, and Ultra Pro, of any violation of Proposition 65 that was brought, or could
have been brought, against Ultra Pro, its parents, subsidiaries, affiliated entities that are under

1 common ownership, directors, officers, employees, attorneys, and each entity to whom Ultra Pro
2 directly or indirectly distributes or sells the Products, including, without limitation, its downstream
3 distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and
4 licensees (“Releasees”), based on Ultra Pro’s alleged failure to warn about exposures to the Listed
5 Chemical contained in the Products it sold in California.

6 **5.2 Plaintiff’s Public Release of Proposition 65 Claims**

7 In further consideration of the promises and agreements herein contained, Plaintiff on behalf
8 of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, and
9 in the interest of the general public, hereby waives all rights to institute or participate in, directly or
10 indirectly, any form of legal action and releases all claims, including, without limitation, all actions
11 and causes of action in law or in equity, suits, liabilities, demands, obligations, damages, costs,
12 fines, penalties, losses, or expenses, including, without limitation, investigation fees, expert fees,
13 and attorneys’ fees – exclusive of fees and costs on appeal, if any – arising under Proposition 65
14 (collectively “Claims”) against Defendant and Releasees. However, the releases provided by this
15 section are specifically limited to those claims that Brimer brought or could have brought against
16 Ultra Pro and the Releasees for Ultra Pro’s alleged failure to warn about exposures to the Listed
17 Chemical contained in the Products it sold or offered for sale in California.

18 **5.3 Brimer’s Individual Release of Claims**

19 Plaintiff also, in his individual capacity only and *not* in his representative capacity, provides
20 a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
21 Claims, liabilities, and demands of plaintiff of any nature, character or kind, whether known or
22 unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to the
23 Listed Chemical in the Products manufactured, distributed, and sold by Ultra Pro.

24 **5.4 Ultra Pro’s Release of Plaintiff**

25 Ultra Pro on behalf of itself, its past and current agents, representatives, attorneys,
26 successors, and/or assignees, hereby waives any and all claims against Brimer and his attorneys and
27 other representatives for any and all actions taken or statements made (or those that could have been
28 taken or made) by Brimer and his attorneys and other representatives, whether in the course of

1 investigating claims, or otherwise seeking to enforce Proposition 65 against Ultra Pro in this matter
2 or with respect to the Products.

3 **6. COURT APPROVAL**

4 This Consent Judgment is not effective until it is approved and entered by the Court and
5 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
6 after it has been fully executed by all Parties, in which event any monies that have been provided to
7 Brimer or his counsel pursuant to Sections 3.1 and/or Section 4.1 shall be refunded within fifteen
8 (15) days after receiving written notice from Ultra Pro that the one-year period has expired.

9 **7. SEVERABILITY**

10 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
11 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
12 remaining shall not be adversely affected.

13 **8. GOVERNING LAW**

14 The terms of this Consent Judgment shall be governed by the laws of the State of California
15 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
16 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Ultra Pro
17 may provide written notice to Brimer of any asserted change in the law, and shall have no further
18 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products
19 are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Ultra Pro from any
20 obligation to comply with any pertinent state or federal toxics control laws.

21 **9. NOTICES**

22 Unless specified herein, all correspondence and notices required to be provided pursuant to
23 this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
24 registered or certified mail, return receipt requested; or (ii) overnight courier on any party by the
25 other party at the following addresses:
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27
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1 For Ultra Pro:

2 Tina I. Mangarpan, Esq.
3 Ford, Walker, Haggerty & Behar, LLP
4 980 Ninth Street
5 Sixteenth Floor
6 Sacramento, CA 95814

7 For Brimer:

8 Proposition 65 Coordinator
9 The Chanler Group
10 2560 Ninth Street
11 Parker Plaza, Suite 214
12 Berkeley, CA 94710

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

15 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

19 **11. ADDITIONAL POST-EXECUTION ACTIVITIES**

20 Brimer agrees to comply with the reporting form requirements referenced in California
21 Health & Safety Code § 25249.7(f)(1). The Parties acknowledge that pursuant to California Health
22 & Safety Code § 25249.7(f)(4) a noticed motion (“Motion”) is required to obtain judicial approval
23 of this Consent Judgment, which Ultra Pro shall draft and Brimer and Ultra Pro shall jointly file.
24 Ultra Pro shall provide all draft documents including, but not limited to, the notice, memorandum of
25 points and authorities, and any required supporting papers to Brimer’s counsel on or before June 30,
26 2011. Upon receipt of the draft documents, Brimer’s counsel shall finalize and file the Motion and
27 all supporting papers with the Court. The Parties further agree and understand that if any third party
28 objection to the Motion is filed, they shall work together to file a joint reply and appear at any
hearing before the Court. This provision is a material component of the Consent Judgment and
shall be treated as such in the event of a breach.

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12. MODIFICATION

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

13. AUTHORIZATION


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

AGREED TO:

AGREED TO:

Date: 6-30-11

Date: _____

By: 
Russell Brimer

By: _____
Eric Miller
Ultra Pro Corporation

1 **12. MODIFICATION**

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

5 **13. 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 hereof.

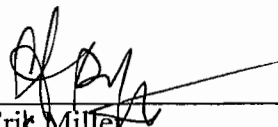
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9 **AGREED TO:**

AGREED TO:

10
11 Date: _____

Date: 6-28-2011

12
13 By: _____
Russell Brimer

By:  _____
Erik Miller
Ultra Pro Corporation
President and CEO