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

12
13 RUSSELL BRIMER,

14 Plaintiff,

15 v.

16 AMASH IMPORTS, INC.; MICHIGAN
INDUSTRIAL TOOLS; O'REILLY
17 AUTOMOTIVE, INC.; O'REILLY
AUTOMOTIVE STORES, INC.; BIG LOTS,
18 INC.; BIG LOTS STORES, INC., and DOES
1-150, inclusive,
19 Defendants.

Case No. CIV1104615

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Russell Brimer,
4 (“Brimer” or “Plaintiff”), and defendants, Amash Imports, Inc. (“Amash”) and Michigan
5 Industrial Tools (“MIT”), with Amash and MIT collectively referred to as the “Defendants” or
6 “MIT,” and Plaintiff and Defendants collectively referred to as the “Parties.”

7 **1.2 Plaintiff**

8 Brimer is an individual residing in the State of California who seeks to promote awareness
9 of exposures to toxic chemicals and to improve human health by reducing or eliminating
10 hazardous substances contained in consumer products.

11 **1.3 Defendants**

12 MIT employs ten or more individuals and is a person in the course of doing business for
13 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
14 Safety Code § 25249.6 *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

16 Brimer alleges that MIT has manufactured, distributed, and/or sold in the State of
17 California, hand tools with grips that expose users to lead without first providing a “clear and
18 reasonable warning” as required under Proposition 65. In addition to lead,
19 di(2ethylhexyl)phthalate (“DEHP”), butyl benzyl phthalate (“BBP”), and Di-n-butyl phthalate
20 (“DBP”) are phthalate chemicals typically present in vinyl or PVC material used, among other
21 things, for grips on hand tools and which are listed under Proposition 65 as chemicals known to
22 cause birth defects and other reproductive harm.¹ Lead, DEHP, BBP, and DBP are collectively
23 referred to herein as “Listed Chemicals.”

24 **1.5 Product Description**

25 The products that are addressed by this Consent Judgment are hand tools with grips
26 containing Listed Chemicals that are manufactured, sold and/or distributed in California by

27 ¹ Lead and DEHP are also listed under Proposition 65 as carcinogens, but the safe harbor levels set by the State of
28 California for cancer effects are above those for reproductive harm such that the latter are more protective of the
public health and are being used by the Parties here.

1 Defendants including, but not limited to, the *Adjustable Rapid Wrench, #2318 (#0 20209 02318*
2 *1)* (collectively “Products”).²

3 **1.6 Notices of Violation**

4 On February 1, 2011, Brimer served MIT and various public enforcement agencies with
5 documents entitled “60-Day Notice of Violation” that alleged that MIT violated Health & Safety
6 Code § 25249.6 by failing to warn its customers and consumers in California that the Products
7 expose users to lead. On November 22, 2011, Brimer issued a Supplemental 60-Day Notice of
8 Violation that alleged that in addition to MIT, O’Reilly Automotive, Inc. and, O’Reilly
9 Automotive Stores, Inc. (“O’Reilly Automotive”), and Big Lots, Inc. and Big Lots Stores, Inc.
10 (“Big Lots”) violated Health & Safety Code § 25249.6 by failing to warn customers and
11 consumers in California that the Products expose users to lead. On April 5, 2012, Brimer served a
12 Second Supplemental 60-Day Notice of Violation alleging that Defendants, O’Reilly Automotive,
13 and Big Lots further violated Health & Safety Code § 25249.6 by failing to warn customers and
14 consumers in California that the Products expose users to DEHP and DBP.³

15 **1.7 Complaints**

16 On September 16, 2011, Brimer, acting in a representative capacity in the public interest
17 in California, filed the instant action (“Complaint”) naming MIT as a defendant, and stating a
18 cause of action for the violations of Health & Safety Code § 25249.6 alleged in Brimer’s February
19 1, 2011 notice letter. Following initial litigation concerning the Complaint, on February 7, 2011,
20 Brimer filed a First Amended Complaint naming O’Reilly Automotive, and Big Lots in addition
21 to MIT as defendants in the action.⁴ Provided that no authorized public prosecutor of Proposition
22 65 files an enforcement lawsuit within sixty-five days of Brimer’s April 5, 2012 supplemental
23 notice letter, the Complaint shall be deemed to have been further amended to include allegations

24 _____
25 ² “Products” as defined herein include, but are not limited to wrenches, screwdrivers, pliers, hammers, saws, tape
26 measures, air blow guns, ratchet tie downs, hand-held work-lights, flashlights, and knife sharpeners; they do not
include hand tools primarily intended for use by children ages 12 and under.

27 ³ Collectively, the notice letters described above are referred to herein as the “Notices.”

28 ⁴ Plaintiff requested the entry of a dismissal without prejudice of The Big Lots, Inc. corporate entity on March 21,
2012.

1 by Brimer against Defendants, O'Reilly and Big Lots concerning their alleged failure to warn
2 under Proposition 65 with respect to DEHP and DBP in the Products as well as with respect to
3 lead.

4 **1.8 No Admission**

5 This Consent Judgment resolves claims that are denied and disputed by Defendants. The
6 Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all
7 claims between the Parties for the purpose of avoiding prolonged litigation. MIT denies the
8 material, factual, and legal allegations contained in the Notices and Complaint and maintains that
9 all of the products it has manufactured, distributed, and/or sold in California, including the
10 Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment
11 shall be construed as an admission by MIT of any fact, finding, conclusion of law, issue of law, or
12 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as
13 an admission by MIT of any fact, finding, conclusion of law, issue of law, or violation of law, the
14 same being specifically denied by MIT. However, this Section shall not diminish or otherwise
15 affect the Parties' obligations, responsibilities, and/or duties under this Consent Judgment.

16 **1.9 Consent to Jurisdiction**

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

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
23 this Consent Judgment is fully executed by the Parties.

24 **2. INJUNCTIVE RELIEF: REFORMULATION**

25 **2.1 Reformulation Commitment**

26 As of the Effective Date, MIT shall only manufacture, or cause to be manufactured,
27 Products for sale in California that are Lead Free and Phthalate Free, as set forth below. For
28

1 purposes of this Consent Judgment, "Lead Free" shall mean Products containing grips that may be
2 handled, touched or mouthed by a consumer, and which components yield less than 300 parts per
3 million ("ppm") lead when analyzed pursuant to U.S. Environmental Protection Agency ("EPA")
4 testing methodologies 3050B and 6010B, or equivalent methodologies utilized by federal or state
5 agencies for the purpose of determining lead content in a solid substance. Additionally, for
6 purposes of this Consent Judgment, "Phthalate Free" shall mean Products containing grips that
7 may be handled, touched or mouthed by a consumer and which yield less than or equal to 1,000
8 parts per million ("ppm") each of DEHP, BBP, and DBP, when analyzed pursuant to EPA testing
9 methodologies 3580A and 8270C or equivalent methodologies utilized by federal or state
10 agencies for the purpose of determining phthalate content.
11

12 **2.2 Exceptions**

13 The requirements set forth in Section 2.1 shall not apply to:

- 14 (iv) Any Products ordered for MIT's inventory prior to December 15, 2012 for the
15 primary purpose of restocking a prior MIT customer of such Products; provided,
16 however, that, unless they have been confirmed to be Lead Free and Phthalate
17 Free, any such Products subsequently made available by MIT for sale in California
18 after the Effective Date bear a clear and reasonable warning meeting the applicable
19 requirements of 27 Cal. Code Reg. § 25601; and/or
20 (v) Stock Keeping Units ("SKUs") of Products sourced by MIT for sale in California
21 following the Effective Date in a quantity of less than 900 units per year and
22 which, in the aggregate, represent less than five percent (5%) of MIT's annual
23 sales; provided, however, that, unless they have been confirmed to be Lead Free
24 and Phthalate Free, any such Products shall bear a clear and reasonable warning
25 meeting the applicable requirements of 27 Cal. Code Reg. § 25601.
26
27
28

1 (iv) For any Products to which the exceptions in Sections 2.2 (i) and (ii) apply, MIT
2 shall affix the warning provided below to the packaging, labeling, or directly on
3 each Product sold in California.

4 **CALIFORNIA WARNING:** This product contains lead and phthalate
5 chemicals known to the State of
6 California to cause birth defects and
other reproductive harm. Please wash
your hands after use.

7 The reference to “lead and” or to “phthalate chemicals” may be omitted from the
8 proceeding if the subject Product has been confirmed to be either Lead Free or
9 Phthalate Free, respectively. For Products, if any, MIT sells by catalog or via the
10 internet or by telephone to California consumers, MIT shall permit consumers who
11 are dissatisfied with the Product because of information contained in the warning
12 to return the Product for a full refund (including shipping costs for both the receipt
13 and the return of the product).

14 **3. MONETARY PAYMENTS**

15 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

16 In settlement of the claims covered by this Consent Judgment, MIT has been assessed civil
17 penalties in the amount of \$85,000, as further described in Sections 3.1.1 and 3.1.2 below.

18 **3.1.1 Initial Civil Penalty**

19 MIT shall make an initial civil penalty payment of \$15,000 to be apportioned in
20 accordance with Health & Safety Code section 25249.12, subdivisions (c)(1) and (d), with 75% of
21 these funds earmarked for the State of California’s Office of Environmental Health Hazard
22 Assessment (“OEHHA”) and the remaining 25% of these penalty monies earmarked for Brimer.
23 Said initial civil penalties have been reduced by \$45,000 due to MIT’s commitment to
24 reformulation with respect to both lead and phthalates as per Section 2.1 above.

25 MIT shall issue two separate checks for the penalty payment: (a) one check made payable
26 to “The Chanler Group in Trust for OEHHA” in an amount representing 75% of the total penalty;
27 and (b) one check to “The Chanler Group in Trust for Russell Brimer” in an amount representing
28 25% of the total penalty. Two separate 1099s shall be issued for the above payments: (a)

1 OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Russell Brimer,
2 whose address and tax identification number shall be furnished, upon request, at least five
3 calendar days before payment is due. Payment shall be delivered to Brimer's counsel for deposit
4 to its trust account on or before ten days following the Effective Date, at the following address:

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

8 Except as provided in Section 6 below, Brimer's counsel shall not remove these funds from its
9 trust account until this Consent Judgment has been approved by the Court.

10 **3.1.2 Second Civil Penalty**

11 MIT shall, if this Consent Judgment is approved by the Court, make a second civil penalty
12 payment of \$25,000 to be apportioned in accordance with Health & Safety Code section
13 25249.12, subdivisions (c)(1) and (d), with 75% of these funds earmarked for OEHHA and the
14 remaining 25% of these penalty monies earmarked for Brimer. This second civil penalty shall be
15 waived in its entirety if MIT certifies in writing to Brimer on or before December 15, 2012, that
16 all of the Products it will manufacture or cause to be manufactured for sale in California after
17 that date will contain less than 100 parts per million of lead when analyzed pursuant to
18 Environmental Protection Agency ("EPA") testing methodologies 3050B and 6010B or
19 equivalent methods as may be allowed under Proposition 65. To the extent the second penalty
20 payment is not waived, MIT shall, by January 4, 2013, issue two separate checks for the second
21 penalty payment: (a) one check made payable to "The Chanler Group in Trust For OEHHA" in
22 an amount representing 75% of the total penalty; and (b) one check to "The Chanler Group in
23 Trust for Russell Brimer" in an amount representing 25% of the total penalty. Two separate
24 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA,
25 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose address and tax identification number
26 shall be furnished, upon request, at least five calendar days before payment is due. Payment
27 shall be delivered to Brimer's counsel at the address shown in subsection 3.1.1 above.
28

1 **3.2 Reimbursement of Plaintiff's Fees and Costs**

2 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
3 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
4 this fee issue to be resolved after the material terms of the agreement had been settled. MIT then
5 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
6 been finalized. Although Brimer was willing to resolve the issue of attorney's fees and cost
7 reimbursement via binding arbitration or by way of motion pursuant to California Code of Civil
8 Procedure §§ 1021.5 *et seq.*, the Parties first attempted to (and did) reach an accord on the
9 compensation due to Brimer and his counsel under general contract principles and the private
10 attorney general doctrine, for all work performed in this matter, except fees that may be incurred
11 on appeal. Under these legal principles, MIT shall reimburse Brimer's counsel for fees and costs
12 incurred as a result of investigating, bringing this matter to their attention, and negotiating a
13 settlement and obtaining approval and entry of this consent judgment. MIT shall pay Brimer and
14 his counsel \$85,000 for all attorneys' fees, expert and investigation fees, and related costs,
15 including the fees and costs associated with negotiating, drafting, and implementing the
16 provisions of this Consent Judgment. The payment shall be issued in a check made payable to
17 "The Chanler Group" and shall be delivered to the same address as set forth in subsection 3.1.1
18 above based on the following installment schedule:

19 (a) 25% of the total amount set forth in subsection 3.2 above shall be paid on or
20 before ten days following the Effective Date. Brimer's counsel shall deposit these funds
21 in its trust account and, except as set forth in Section 6 below, shall not remove them from
22 its trust account until this Consent Judgment has been approved by the Court;

23 (b) 50% of the total amount set forth in subsection 3.2 above shall be paid on or
24 before five business days following receipt of notice that this Consent Judgment has been
25 entered and approved by the Court; and

26 (c) 25% of the total amount set forth in subsection 3.2 above shall be paid on or
27 before January 4, 2013.
28

1 MIT shall issue a separate Form 1099 for attorney's fees and costs paid under this paragraph to
2 The Chanler Group, 2560 Ninth Street, Parker Plaza, Suite 214, Berkeley, California 94710 (EIN:
3 94-3171522).

4 **4. CLAIMS COVERED AND RELEASED**

5 **4.1 Plaintiff's Public Release of Proposition 65 Claims**

6 In consideration of the promises and commitments herein contained, Brimer on behalf of
7 himself and his past and current agents, representatives, attorneys, successors, and/or assignees,
8 and in the public interest, hereby releases Defendants; all of their directors, officers, employees,
9 agents, affiliated trading partners, and shareholders ("Releasees"); and each of any of their
10 downstream distributors, dealers, customers, purchasers, and retailers ("Downstream Defendant
11 Releasees", including but not limited to O'Reilly Automotive and Big Lots), from all claims for
12 violations of Proposition 65 arising up through the Effective Date based on exposure to lead
13 from Products as set forth in the Notices. The Parties understand and agree that this release shall
14 not extend to entities that manufactured the Products or any component parts thereof.
15 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
16 with respect to exposures to lead in the Products. As of sixty-five days following the issuance of
17 the Second Supplemental Notice of Violation and provided that no authorized public prosecutor
18 of Proposition 65 has elected to proceed on the additional claims described therein by means of
19 filing a Proposition 65 enforcement lawsuit, the releases provided in and on behalf of the public
20 interest in this subsection shall extend to DEHP and DBP as well as to lead.

21 **4.2 Plaintiff's Private Release of Claims**

22 Brimer, on behalf of himself and his past and current agents, representatives, attorneys,
23 successors, and/or assignees and *not* in his representative capacity, also agrees to release
24 Defendants, their Releasees, and the Downstream Defendant Releasees as to Proposition 65
25 claims arising up to the Effective Date relating to DEHP, BBP, or DBP in the Products. The
26 Parties understand and agree that, except as provided in the last sentence of the preceding
27 subsection, these further releases are not being given on behalf of the public interest; however,
28 compliance with the terms of Section II of this Consent Judgment constitutes compliance with the

1 Court's continuing injunction with respect to the application of Proposition 65 to the Listed
2 Chemicals in Products, including as to DEHP, DBP, and BBP.

3 **4.3 Defendants' Release of Brimer**

4 Defendants on behalf of themselves, their past and current agents, representatives,
5 attorneys, successors, and/or assignees, hereby waive any and all claims against Brimer, his
6 attorneys and other representatives, for any and all actions taken or statements made (or those
7 that could have been taken or made) by Plaintiff and his attorneys and other representatives,
8 whether in the course of investigating claims or otherwise seeking to enforce Proposition 65
9 against them in this matter with respect to the Products.

10 **5. SEVERABILITY**

11 If, subsequent to the Court's approval of this Consent Judgment, any of the provisions
12 contained herein are held by a court to be unenforceable, the validity of the enforceable provisions
13 remaining shall not be adversely affected unless the Court finds that any unenforceable provision
14 is not severable from the remainder of the Consent Judgment.

15 **6. COURT APPROVAL**

16 This Consent Judgment is not effective until it is approved and entered by the Court and
17 shall be null and void if, for any reason, it is not approved and entered by the Court within twelve
18 months of it being fully executed by the Parties, at which time, Brimer's counsel shall, within
19 thirty days, fully reimburse to MIT any funds that MIT has tendered to it or its trust account
20 pursuant to this agreement.

21 **7. GOVERNING LAW**

22 The terms of this Consent Judgment shall be governed by the laws of the State of
23 California and apply within the State of California. In the event that Proposition 65 is repealed or
24 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then MIT
25 shall provide written notice to Brimer of any asserted change in the law, and shall have no further
26 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products
27 are so affected.
28

1 **8. NOTICE**

2 When any party is entitled to receive any notice under this Consent Judgment, the notice
3 shall be sent by certified mail to the person(s) identified below:

4 To MIT:

5 Attallah Amash, President
6 Michigan Industrial Tools
7 3707 Roger B. Chaffee Drive SE
8 Grand Rapids, MI 49548

9 With copy to:

10 Robert Falk
11 Morrison & Foerster
12 425 Market Street, 32nd Floor
13 San Francisco, CA 94105

14 To Brimer:

15 The Chanler Group
16 Attn: Proposition 65 Coordinator
17 2560 Ninth Street
18 Parker Plaza, Suite 214
19 Berkeley, CA 94710-2565

20 Any party may modify the person and/or address to which notice is to be sent by informing each
21 other party of its intent by certified mail and/or other verifiable form of written communication.

22 **9. MODIFICATION**

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

26 **10. ADDITIONAL POST-EXECUTION ACTIVITIES**

27 Brimer agrees to comply with the reporting form requirements referenced in California
28 Health & Safety Code §25249.7(f). The Parties further acknowledge that, pursuant to Health &
Safety Code §25249.7(f)(4), a noticed motion is required to obtain judicial approval of this
Consent Judgment. In furtherance of obtaining approval of this Consent Judgment, Brimer and
MIT and their respective counsel agree to mutually employ their best efforts to support the entry
of this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the
Court in a timely manner. For purposes of this paragraph, “best efforts” shall include, at a

1 minimum, cooperating on the drafting and filing any papers in support of the required motion for
2 judicial approval, on which Brimer's counsel shall take the lead role.

3 **11. ENTIRE AGREEMENT**


4 This Consent Judgment contains the sole and entire agreement and understanding of the
5 Parties. No representations, oral or otherwise, express or implied, other than those contained
6 herein, have been made by any party hereto. No other agreements shall be deemed to exist or to
7 bind any of the parties.

8 **12. COUNTERPARTS, FACSIMILE SIGNATURES**

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

12 **13. AUTHORIZATION**

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

AGREED TO:	AGREED TO:
Dated: <u>4-16-12</u>	Dated: _____
By:  Russell Brimer	By: _____ Attallah Amash, President Michigan Industrial Tools

23 **IT IS HEREBY ORDERED:**

24 Dated: _____
Judge, Superior Court

1 minimum, cooperating on the drafting and filing any papers in support of the required motion for
2 judicial approval, on which Brimer's counsel shall take the lead role.

3 **11. ENTIRE AGREEMENT**

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11 when taken together, shall constitute one and the same documents.

12 **13. AUTHORIZATION**

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

16 **AGREED TO:** **AGREED TO:**
17 Dated: _____ Dated: 04/12/2012

18
19 By: _____ By: Attallah Amash
20 Russell Brimer Attallah Amash, President
21 Michigan Industrial Tools

22
23 **IT IS HEREBY ORDERED:**

24 Dated: _____ Judge, Superior Court
25
26
27
28