

1 Clifford A. Chanler, State Bar No. 135534  
2 Christopher M. Martin, State Bar No. 186021  
3 THE CHANLER GROUP  
4 2560 Ninth Street  
5 Parker Plaza, Suite 214  
6 Berkeley, California 94710-2565  
7 Telephone: (510) 848-8880  
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff  
10 RUSSELL BRIMER

**ENDORSED  
FILED  
ALAMEDA COUNTY**

**JUN 24 2011**

CLERK OF THE SUPERIOR COURT  
By AN Kanae, Deputy

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF ALAMEDA - UNLIMITED CIVIL JURISDICTION

13 RUSSELL BRIMER,

14 Plaintiff,

15 v.

16 EMPIRE LEVEL MFG. CORP.; and DOES 1-  
17 150, inclusive,

18 Defendants.

Case No. RG10527202

**[PROPOSED] JUDGMENT  
PURSUANT TO STIPULATION AND  
ORDER RE: CONSENT JUDGMENT**

Date: May 11, 2011  
Time: 3:00 p.m.  
Dept.: 301

Action Filed: July 23, 2010  
Reservation No. R-1130897

1 In the above-entitled action, Plaintiff RUSSELL BRIMER and Defendant EMPIRE LEVEL  
2 MANUFACTURING CORP. having agreed through their respective counsel that judgment be  
3 entered pursuant to the terms of the Proposition 65 settlement agreement in the form of a Stipulation  
4 and [Proposed] Order Re: Consent Judgment (“Consent Judgment”) entered into by the parties, and  
5 following issuance of an order approving this Proposition 65 settlement agreement and entering the  
6 Consent Judgment on May 11, 2011,

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Code of Civil  
8 Procedure § 664.6, judgment is entered in accordance with the terms of the Consent Judgment  
9 attached hereto as Exhibit 1.

10 **IT IS SO ORDERED.**

11  
12 Dated: JUN 24 2011

**MARSHALL I. WHITLEY**  
JUDGE OF THE SUPERIOR COURT

# Exhibit 1

1 Clifford A. Chanler, State Bar No. 135534  
2 Christopher M. Martin, State Bar No. 186021  
3 **THE CHANLER GROUP**  
4 2560 Ninth Street  
5 Parker Plaza, Suite 214  
6 Berkeley, CA 94710-2565  
7 Telephone: (510) 848-8880  
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff  
10 **RUSSELL BRIMER**

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

13 **RUSSELL BRIMER,**  
14 Plaintiff,

15 v.

16 **EMPIRE LEVEL MFG. CORP.;** and DOES 1  
17 through 150,  
18 Defendants.

) Case No. RG10527198

) **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 Defendant Empire Level Mfg. Corp. (“Empire Level” or “Defendant”), with  
5 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 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, tape measure products with grips that expose users to lead, without first providing  
17 “clear and reasonable warning” under Proposition 65. Lead is listed as a reproductive and  
18 developmental toxicant pursuant to Proposition 65 and is referred to hereinafter as the “Listed  
19 Chemical.” Tape measure products that allegedly expose users to Lead are referred to herein as  
20 the “Products”.

21              **1.5     Notice of Violation**

22              On February 12, 2010, Brimer served Defendant and various public enforcement agencies  
23 with a document entitled “60-Day Notice of Violation” that provided public enforcers and  
24 Defendant with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn  
25 consumers that Products that Defendant distributed and/or sold exposed users in California to  
26 lead.

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**1.6 Complaint**

On July 23, 2010, Brimer, acting in the interest of the general public in California, filed a complaint in the Superior Court for the County of Alameda, alleging violations of Health & Safety Code § 25249.6 based on the alleged exposures to lead contained in Products distributed and/or sold by Defendant. This action shall hereinafter be referred to as the "Action."

**1.7 No Admission**

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

**1.8 Consent to Jurisdiction**

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

**2. INJUNCTIVE RELIEF: REFORMULATION**

**Tape Measures.** Commencing on October 1, 2010, Empire Level shall not manufacture or have shipped to it Products that will be offered for sale in California unless such Products are "Lead Free." For purposes of this Consent Judgment, "Lead Free" Products shall mean Products containing components that may be handled, touched or mouthed by a consumer, and which components yield less than 1.0 microgram of lead when using a wipe test pursuant to NIOSH Test

1 Method 9100, and yield less than 100 parts per million ("ppm") lead when analyzed pursuant to  
2 EPA testing methodologies 3050B and 6010B, or equivalent methodologies utilized by federal or  
3 state agencies for the purpose of determining lead content in a solid substance. Products that are  
4 Lead Free are referred to hereinafter as "Reformulated Products."

5 **3. MONETARY PAYMENTS**

6 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

7 3.1.1 In settlement of all claims related to the Products and Listed Chemical  
8 referred to in the Complaint and this Consent Judgment, pursuant to Health & Safety Code §  
9 25249.7(b), Defendant shall pay \$1,500 in civil penalties.

10 3.1.2 Civil penalties are to be apportioned in accordance with California Health  
11 & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of  
12 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty  
13 remitted to Brimer as provided by California Health & Safety Code §25249.12(d). Defendant  
14 shall issue two separate checks for the penalty payment: (a) one check made payable to "The  
15 Chanler Group in Trust for OEHHA" in an amount representing 75% of the total penalty; and (b)  
16 one check to "The Chanler Group in Trust for Brimer" in an amount representing 25% of the total  
17 penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box  
18 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose information  
19 shall be provided five (5) calendar days before the payment is due.

20 3.1.3 Payment shall be delivered to Brimer's counsel at the following address on  
21 or before October 1, 2010:

22 The Chanler Group  
23 Attn: Proposition 65 Controller  
24 2560 Ninth Street  
25 Parker Plaza, Suite 214  
26 Berkeley, CA 94710-2565  
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1       **4. REIMBURSEMENT OF FEES AND COSTS**

2           **4.1 Attorney Fees and Costs**

3           4.1.1 The parties reached an accord on the compensation due to Brimer and his  
4 counsel under general contract principles and the private attorney general doctrine codified at  
5 California Code of Civil Procedure (C.C.P.) §1021.5, for all work performed through the mutual  
6 execution of this agreement and approval by the trial court, excluding any fees on appeal.  
7 Defendant shall pay Brimer and his counsel a total of \$30,000 for fees and costs incurred as a  
8 result of investigating, bringing this matter to Defendant's attention, and litigating and negotiating  
9 a settlement in the public interest.

10          4.1.2 The payment shall be issued in a third separate check made payable to  
11 "The Chanler Group" and shall be delivered to Brimer's counsel at the following address on or  
12 before October 1, 2010:

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

18       **5. CLAIMS COVERED AND RELEASE**

19           **5.1 Brimer's Release of Defendant and its Chain of Distribution**

20           5.1.1 This Consent Judgment is a full, final, and binding resolution between  
21 Brimer, acting on behalf of himself and in the interest of the general public, and Defendant, its  
22 owners, subsidiaries, affiliates, sister and related companies, employees, shareholders, directors,  
23 insurers, attorneys, successors, and assigns ("Defendant Releasees"), and all entities to whom  
24 they directly or indirectly distribute or sell Products, including but not limited to distributors,  
25 wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Downstream  
26 Defendant Releasees") of any violation of Proposition 65 or any statutory or common law claim  
27 that has been or could have been asserted against Defendant Releasees and Downstream  
28 Defendant Releasees individually or in the public interest regarding the failure to warn about  
exposure to the Listed Chemical arising in connection with Products manufactured and/or shipped



1 prior to the Effective Date even if sold by Downstream Defendant Releasees after the Effective  
2 Date. Defendant's compliance with this Consent Judgment shall constitute compliance with  
3 Proposition 65 with respect to the Listed Chemical in Products for both Defendant Releasees and  
4 Downstream Defendant Releasees for Products distributed and/or sold by Defendant after the  
5 Effective Date.

6 5.1.2 Brimer on behalf of himself, his past and current agents, representatives,  
7 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives  
8 with respect to Products all rights to institute or participate in, directly or indirectly, any form of  
9 legal action and releases all claims, including, without limitation, all actions, and causes of action,  
10 in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses,  
11 or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of  
12 any nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"),  
13 against Defendant Releasees and Downstream Defendant Releasees that arise under Proposition  
14 65 or any other statutory or common law claims that were or could have been asserted in the  
15 public interest, as such claims relate to Defendant Releasees' and Downstream Defendant  
16 Releasees' alleged failure to warn about exposures to the Listed Chemical contained in the  
17 Products.

18 5.1.3 Brimer also, on behalf of himself, his past and current agents,  
19 representatives, attorneys, successors, and/or assignees and not in his representative capacity,  
20 provides a general release herein which shall be effective as a full and final accord and  
21 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,  
22 damages, losses, claims, liabilities and demands of any nature, character or kind, known or  
23 unknown, suspected or unsuspected, against Defendant Releasees and Downstream Defendant  
24 Releasees arising under Proposition 65, as such claims relate to Defendant Releasees' alleged  
25 failure to warn about exposures to or identification of any chemicals listed under Proposition 65  
26 contained in any products sold by Defendant Releasees. Brimer acknowledges that he is familiar  
27 with Section 1542 of the California Civil Code, which provides as follows:  
28

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

5 Brimer, in his individual capacity only and *not* in his representative capacity, and on behalf of  
6 himself, his past and current agents, representatives, attorneys, successors, and/or assignees  
7 expressly waives and relinquishes any and all rights and benefits which he may have under, or  
8 which may be conferred on him by the provisions of Section 1542 of the California Civil Code as  
9 well as under any other state or federal statute or common law principle of similar effect, to the  
10 fullest extent that he may lawfully waive such rights or benefits pertaining to the released matters.  
11 In furtherance of such intention, the release hereby given shall be and remain in effect as a full  
12 and complete release notwithstanding the discovery or existence of any such additional or  
13 different claims or facts arising out of the released matters.

14 5.1.4 Upon court approval of the Consent Judgment, the Parties waive their  
15 respective rights to a hearing or trial on the allegations of the Complaint.

16 5.1.5 The Parties further understand and agree that, except as provided for above,  
17 this release shall not extend upstream to any third parties that manufactured the Products or any  
18 component parts thereof, or any distributors or suppliers who sold the Products or any component  
19 parts thereof to Defendant.

20 **5.2 Defendant's Release of Brimer**

21 5.2.1 Defendant waives any and all claims against Brimer, his attorneys, and  
22 other representatives for any and all actions taken or statements made (or those that could have  
23 been taken or made) by Brimer and his attorneys and other representatives, whether in the course  
24 of investigating claims or otherwise seeking enforcement of Proposition 65 against them in this  
25 matter, and/or with respect to the Products.

26 5.2.2 Defendant also provides a general release herein which shall be effective as  
27 a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,  
28 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Defendant of any  
nature, character or kind, known or unknown, suspected or unsuspected, arising out of the subject

1 matter of the Action. Defendant acknowledges that it is familiar with Section 1542 of the  
2 California Civil Code, 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 FAVOR AT THE TIME OF EXECUTING THE  
5 RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS  
6 SETTLEMENT WITH THE DEBTOR.

7 Defendant expressly waives and relinquishes any and all rights and benefits which it may  
8 have under, or which may be conferred on it by the provisions of Section 1542 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 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  
28 such funds.

1       **8.       GOVERNING LAW**

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

7       **9.       NOTICES**

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

10              To Defendant:  
11              Jennifer Becker  
12              President  
13              Empire Level Mrg. Corp.  
14              929 Empire Drive  
15              Mukwonago, WI 53149

16              With copy to:  
17              James Robert Maxwell, Esq.  
18              Rogers Joseph O'Donnell  
19              311 California Street  
20              San Francisco, CA 94104

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

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

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

30              Brimer agrees to comply with the reporting form requirements referenced, in California  
31       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  
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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1 **15. COUNTERPARTS, FACSIMILE SIGNATURES**

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

5 **16. 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 of this Consent Judgment.

8  
9 **AGREED TO:**

10 Date: 9-14-10

**AGREED TO:**

Date: 9/13/2010

11  
12 By:   
13 Plaintiff Russell Brimer

14 By:   
15 Joe Kubaeki  
16 Empire Level Mfg. Corp.

17 **IT IS SO ORDERED.**

18 Dated: \_\_\_\_\_

19 By \_\_\_\_\_  
20 Judge of the Superior Court

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