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FILED

JUL 27 2012

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: A. Garcia, Deputy

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF MARIN

12 UNLIMITED CIVIL JURISDICTION

13
14 RUSSELL BRIMER,

15 Plaintiff,

16 v.

17 MELNOR, INC.; and DOES 1-150, inclusive,

18 Defendants.

Case No. CIV 1003367

**~~[PROPOSED]~~ JUDGMENT PURSUANT
TO TERMS OF PROPOSITION 65
SETTLEMENT AND ~~[PROPOSED]~~
CONSENT JUDGMENT AS TO
DEFENDANT MELNOR, INC.**

Date: June 27, 2012

Time: 8:30 a.m.

Dept. B

Judge: Hon. Roy O. Chernus

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Plaintiff Russell Brimer and Defendant Melnor, Inc., having agreed through their respective counsel that Judgment be entered pursuant to the terms of their settlement agreement in the form of a Consent Judgment, and following this Court's issuance of an Order approving this Proposition 65 settlement and Consent Judgment,

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

IT IS SO ORDERED.

Dated: 2/27/12



JUDGE OF THE SUPERIOR COURT

Exhibit 1

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Melnor, Inc.**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer”
4 or “Plaintiff”) and defendant Melnor, Inc. (“Melnor” or “Defendant”), with Brimer and Melnor
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 Melnor 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 §25249.5 et seq. (“Proposition 65”).

14 **1.4 General Allegations.**

15 Brimer alleges that Melnor has manufactured, distributed, sold, and/or offered for sale
16 watering gun/nozzles with hand grips containing lead, di(2-ethylhexyl)phthalate (DEHP), and/or
17 di-n-butyl phthalate (DBP) for use in the State of California without the requisite Proposition 65
18 warnings. Lead, DBP, and DEHP are listed pursuant to Proposition 65 as chemicals known to the
19 State of California to cause birth defects and other reproductive harm.

20 **1.5 Notices of Violation.**

21 1.5.1 On February 12, 2010, Brimer served Melnor and various public
22 enforcement agencies with a document entitled “60-Day Notice of Violation,” that alleged that
23 Melnor violated Proposition 65 by failing to warn consumers that watering gun/nozzles with hand
24 grips including, but not limited to, the *Melnor Metal Aqua Gun, #T201. (#0 42206 20201 7)*,
25 exposed users in California to lead.

26 1.5.2 On January 19, 2012, Brimer served Melnor and various public enforcement
27 agencies with a document entitled “Second Supplemental 60-Day Notice of Violation,” that
28 alleged that Melnor violated Proposition 65 by failing to warn consumers that watering

1 gun/nozzles with hand grips including, but not limited to, the *Melnor Metal Aqua Gun, #T201,*
2 *(#0 42206 20201 7)* and *Melnor Adjustable Metal Tip Water Nozzle, #470-640 (#0 42206 20200*
3 *0)*, exposed users in California to lead, DBP, and DEHP.

4 **1.6 Complaint.** On June 28, 2010, Brimer filed a complaint in this action, naming
5 Melnor as a defendant, alleging violations of Health & Safety Code § 25249.6 based on the
6 alleged exposures to lead contained in watering gun/nozzles with hand grips manufactured,
7 distributed, sold, and/or offered for sale by Melnor. In the event that no public enforcer
8 undertakes diligent prosecution of the allegations set forth in the Second Supplemental Notice,
9 and upon entry of this Consent Judgment by the Court, the Complaint shall be deemed amended
10 to include the allegations contained in the January 19, 2012 Notice relating to DBP and DEHP.

11 **1.7 No Admission.** The Parties enter into this Consent Judgment as a full and final
12 settlement of all claims that were raised in the Complaint or that could have been raised in the
13 Complaint, arising out of the facts or conduct alleged therein. By execution of this Consent
14 Judgment and agreeing to comply with its terms, Melnor does not admit any facts or conclusions
15 of law, including, but not limited to, any facts or conclusions of law suggesting or demonstrating
16 any violations of Proposition 65 or any other statutory, common law or equitable requirements
17 relating to lead, DBP, and DEHP in Covered Products as defined in section 2.3. Nothing in this
18 Consent Judgment shall be construed as an admission by Melnor of any fact, conclusion of law,
19 issue of law or violation of law, nor shall compliance with the Consent Judgment constitute or be
20 construed as an admission by Melnor of any fact, conclusion of law, issue of law, or violation of
21 law. Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy,
22 argument or defense Melnor may have in this or any other or future legal proceedings. This
23 Consent Judgment is the product of negotiation and compromise and is accepted by Melnor for
24 purposes of settling, compromising, and resolving issues disputed in this action. However, this
25 section shall not diminish or otherwise affect the obligations, responsibilities and duties of
26 Melnor under this Consent Judgment.

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1 1.8 **Consent to Jurisdiction.** For purposes of this Consent Judgment only, Melnor
2 stipulates that this Court has jurisdiction over Melnor as to the allegations contained in the
3 Complaint, that venue is proper in the County of Marin and that this Court has jurisdiction to
4 enter and enforce the provisions of this Consent Judgment.

5 **2. Definitions.**

6 2.1 “2P Standard” means a maximum concentration of DEHP or DBP of 1,000 parts
7 per million by weight (“ppm”).

8 2.2 “Accessible Component” means a component of a Covered Product (as defined in
9 section 2.3 below) that could be touched by a person during reasonably foreseeable use.

10 2.3 “Covered Products” means watering gun/nozzles with hand grips manufactured,
11 distributed or sold by Melnor.

12 2.4 “Effective Date” means the date this Consent Judgment is approved by the Court.

13 2.5 “Lead Free” means a maximum concentration of 100 parts per million (“ppm”)
14 lead by weight, when analyzed pursuant to any methodology utilized by federal or state agencies
15 for the purpose of determining lead content in a solid substance.

16 **3. INJUNCTIVE RELIEF: REFORMULATION**

17 3.1 **Lead in Covered Products.** Commencing on the Effective Date, Melnor shall not
18 sell or offer for sale in California any Covered Product unless each Accessible Component in
19 such Covered Product is Lead Free.

20 3.2 **2P in Covered Products.** Commencing on the Effective Date, Melnor shall not
21 sell or offer for sale in California any Covered Product unless each Accessible Component in
22 such Covered Product complies with the 2P Standard.

23 **4. ENFORCEMENT OF CONSENT JUDGMENT**

24 4.1 **General Enforcement Provisions.** Any Party may, by motion or application for
25 an order to show cause before the Superior Court of the County of Marin, enforce the terms and
26 conditions contained in this Consent Judgment. A Party may file such a motion or application
27 only after that Party first provides 30 days notice to the Party allegedly failing to comply with the
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1 terms and conditions of this Consent Judgment and attempts to resolve such Party's failure to
2 comply in an open and good faith manner for a period of no less than 30 days.

3 **5. MONETARY PAYMENTS**

4 **5.1 Payments Made Pursuant to Health & Safety Code §25249.7(b).**

5 Melnor shall pay \$8,000 to be apportioned in accordance with California Health & Safety
6 Code §25192, with 75% of these funds remitted to the State of California's Office of
7 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the amount
8 remitted to Russell Brimer as provided by California Health & Safety Code §25249.12(d).
9 Melnor shall issue two separate checks for the payment: (a) one check made payable to "The
10 Chanler Group in trust For OEHHA" in the amount of \$6,000 representing 75% of the total
11 payment; and (b) one check to "The Chanler Group in trust for Russell Brimer" in the amount of
12 \$2,000, representing 25% of the total payment. Two separate 1099s shall be issued for the above
13 payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b)
14 Russell Brimer, whose information shall be provided five calendar days before the payment is
15 due.

16 Payment shall be delivered to Brimer's counsel within two business days of the Effective
17 Date, at the following address:

18 The Chanler Group
19 Attn: Proposition 65 Controller
20 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

21 **5.2 Reimbursement of Fees and Costs.**

22 Pursuant to Code of Civil Procedure §1021.5, Melnor shall reimburse Brimer and his
23 counsel a total of \$40,000 for fees and costs incurred as a result of investigating, bringing this
24 matter to Melnor's attention, and litigating and negotiating and obtaining approval of a settlement
25 in the public interest. Melnor shall issue a separate 1099 for fees and costs (EIN: 20-3929984)
26 and shall make the check payable to "The Chanler Group" and to be delivered within two
27 business days of the Effective Date, to the following address:

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

6 **6. CLAIMS COVERED AND RELEASE**

7 6.1 This Consent Judgment is a full, final, and binding resolution between Brimer, on
8 behalf of himself and in the public interest and Melnor and its parents, subsidiaries, affiliated
9 entities, sister and related companies, directors, officers, shareholders, employees, attorneys,
10 successors and assigns, (collectively "Defendant Releasees") and each entity to whom Defendant
11 directly or indirectly distributes or sells Covered Products, including but not limited to
12 downstream distributors, wholesalers, customers, resellers, retailers, franchisees, cooperative
13 members, licensors, and licensees that sold or distributed the Covered Products (collectively
14 "Downstream Defendant Releasees"), of any violation of Proposition 65 regarding the failure to
15 warn about exposure to lead, DEHP, and DBP arising in connection with Covered Products
16 manufactured, sourced, distributed, sold, offered for sale by Defendant Releasees prior to the
17 Effective Date. Compliance with the terms of this Consent Judgment by Melnor and Defendant
18 Releasees constitutes compliance with Proposition 65 with respect to lead, DEHP, and DBP in
19 Covered Products.

20 6.2 In further consideration of the promises and agreements herein contained, Brimer
21 on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or
22 assignees, and in the interest of the general public, hereby waives all rights to institute or
23 participate in, directly or indirectly, any form of legal action and releases all claims, including,
24 without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands,
25 obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to,
26 investigation fees, expert fees, and attorneys' fees) limited to and arising out of alleged or actual
27 exposures to lead, DEHP, and DBP in the Covered Products up through the Effective Date
28 (collectively "Claims"), against Melnor Defendant Releasees, and Downstream Defendant
Releasees.

1 6.3 Brimer also, in his individual capacity only and *not* in his representative capacity,
2 provides a general release herein which shall be effective as a full and final accord and
3 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
4 damages, losses, claims, liabilities and demands of Brimer of any nature, character or kind,
5 whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or
6 actual exposures to any chemical listed pursuant to Proposition 65 in the Covered Products
7 manufactured, distributed, sold or offered for sale by Defendant Releasees and Downstream
8 Defendant releases.

9 6.4 Brimer acknowledges that he is familiar with Section 1542 of the California Civil
10 Code, which provides as follows:

11 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
12 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
13 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
14 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
15 HER SETTLEMENT WITH THE DEBTOR.

16 Brimer, expressly waives and relinquishes any and all rights and benefits which he may
17 have under, or which may be conferred on him by the provisions of Section 1542 of the
18 California Civil Code as well as under any other state or federal statute or common law principle
19 of similar effect, to the fullest extent that he may lawfully waive such rights or benefits pertaining
20 to the released matters. In furtherance of such intention, the release hereby given shall be and
21 remain in effect as a full and complete release notwithstanding the discovery or existence of any
22 such additional or different claims or facts arising out of alleged or actual exposure now or in the
23 future to lead, DEHP, and DBP in the Covered Products manufactured, imported, distributed, sold
24 or offered for sale by Melnor, that could otherwise be made against Melnor, Defendant Releasees,
25 and Downstream Defendant Releasees.

26 6.5 Melnor on behalf of itself, its past and current agents, representatives, attorneys,
27 successors, and/or assignees, hereby waives any and all Claims against Brimer, his attorneys, and
28 other representatives for any and all actions taken or statements made (or those that could have
been taken or made) by Brimer and his attorneys and other representatives, whether in the course

1 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this
2 matter with respect to the Covered Products.

3 **7. COURT APPROVAL**

4 7.1 Plaintiff shall file a motion seeking approval of this Consent Judgment pursuant to
5 California Health & Safety Code §25249.7(f), and Melnor shall support the entry of such motion.

6 7.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
7 and any and all prior agreements between the parties merged herein shall terminate and become
8 null and void, and the action shall revert to the status that existed prior to the execution date of
9 this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
10 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall
11 have any effect, nor shall any such matter be admissible in evidence for any purpose in this
12 action, or in any other proceeding; and (c) the parties agree to meet and confer to determine
13 whether to modify the terms of the Consent Judgment and to resubmit it for approval.

14 **8. ATTORNEYS' FEES**

15 8.1 Except as specifically provided in Section 5.2, and if a third party elects to appeal
16 the approval of the Consent Judgment, each Party shall bear its own costs and attorney's fees in
17 connection with this action.

18 **9. GOVERNING LAW**

19 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
20 California, and shall apply only to Covered Products offered for sale in the State of California. In
21 the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law
22 generally, or as to the Products, then Melnor may provide written notice to Brimer of any asserted
23 change in the law, and shall have no further obligations pursuant to this Consent Judgment with
24 respect to, and to the extent that, the Covered Products are so affected.

25 9.2 The Parties, including their counsel, have participated in the preparation of this
26 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
27 Consent Judgment was subject to revision and modification by the Parties and has been accepted
28 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or

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1 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
2 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
3 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
4 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
5 this regard, the Parties hereby waive California Civil Code § 1654.

6 **10. NOTICES**

7 10.1 Unless specified herein, all correspondence and notices required to be provided
8 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)
9 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
10 Party by the other Party at the following addresses:

11 To Melnor:

12 Juergen Nies
13 Melnor, Inc.
14 260 West Brooke Road
15 Winchester, Virginia 22603

16 With a copy to:

17 Jeffrey B. Margulies, Esq.
18 Fulbright & Jaworski LLP
19 555 South Flower Street, 41st Floor
20 Los Angeles, CA 90071
21 213-892-9286, 213-892-9494 fax
22 jmargin@fulbright.com

23 To Brimer:

24 Proposition 65 Coordinator
25 The Chanler Group
26 2560 Ninth Street
27 Parker Plaza, Suite 214
28 Berkeley, CA 94710-2565

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

1 **11. MODIFICATION**

2 **11.1 Modification.** This Consent Judgment may be modified by written agreement of
3 the Parties and upon entry of a modified Consent Judgment by the court, or by motion of any
4 Party and entry of a modified Consent Judgment by the court.

5 **11.2 Subsequent Legislation.** If, subsequent to the Effective Date, legislation or
6 regulation is adopted that addresses the lead, DBP, and/or DEHP content of Covered Products
7 sold in California, any Party shall be entitled to request that the Court modify the reformulation
8 standard of Section 3.1 of this Consent Judgment for good cause shown.

9 **11.3 Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
10 shall attempt in good faith to meet and confer with the other Party prior to filing a motion to
11 modify the Consent Judgment.

12 **12. ENTIRE AGREEMENT**

13 **12.1** This Consent Judgment contains the sole and entire agreement and understanding
14 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
15 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
16 and therein. No supplementation, modification, waiver, or termination of this Consent Judgment
17 shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of
18 the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the
19 other provisions hereof whether or not similar, nor shall such waiver constitute a continuing
20 waiver.

21 **13. RETENTION OF JURISDICTION**

22 **13.1** This Court shall retain jurisdiction of this matter to implement or modify the
23 Consent Judgment.

24 **14. COUNTERPARTS; FACSIMILE SIGNATURES**

25 **14.1** This Consent Judgment may be executed in counterparts and by facsimile or
26 portable document format (.pdf), each of which shall be deemed an original, and all of which,
27 when taken together, shall constitute one and the same document.

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1 **15. AUTHORIZATION**

2 15.1 The undersigned are authorized to execute this Consent Judgment on behalf of
3 their respective Parties and have read, understood, and agree to all of the terms and conditions of
4 this Consent Judgment.

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AGREED TO:	AGREED TO:
Date: _____	Date: <u>2/27/2012</u>
By: _____ Plaintiff RUSSELL BRIMER	By: <u>[Signature]</u> Defendant MELNOR, INC. <u>President & CEO</u>

IT IS SO ORDERED.

Date: _____
JUDGE OF THE SUPERIOR COURT