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6 Attorneys for Plaintiff
RUSSELL BRIMER

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 FOR THE CITY AND COUNTY OF SAN FRANCISCO
9 UNLIMITED CIVIL JURISDICTION
10

11 RUSSELL BRIMER,

12 Plaintiff,

13 v.

14 ACCO BRANDS CORPORATION, et al.,

15 Defendants.
16

Case No. CGC-09-485784

[PROPOSED] CONSENT JUDGMENT

17
18 **1. INTRODUCTION**

19 **1.1 The Parties**

20 This Consent Judgment is entered into by and between Plaintiff Russell Brimer (“Brimer”
21 or “Plaintiff”) and Defendant Kole Imports (“Kole”) (“Settling Defendant”), with Plaintiff and
22 Defendant collectively referred to as the “Parties.”

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1.2 Plaintiff

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

1.3 Settling Defendant

Settling Defendant employs 10 or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6 et seq. ("Proposition 65").

1.4 General Allegations

Brimer alleges that Settling Defendant has manufactured, distributed and/or sold, in the State of California, vinyl coated paper fasteners, vinyl coated measuring tapes, and vinyl coated craft wire that expose users to lead, without first providing "clear and reasonable warning" under Proposition 65. Lead is listed as a reproductive and developmental toxicant pursuant to Proposition 65 and is referred to hereinafter as the "Listed Chemical." Settling Defendant denies Brimer's allegations.

1.5 Notices of Violation

On November 28, 2008, Brimer served Settling Defendant and various public enforcement agencies with a document entitled "60-Day Notice of Violation" that provided public enforcers and Settling Defendant with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn consumers that vinyl coated paper fasteners that Settling Defendant manufactured, distributed and/or sold exposed users in California to lead.

On February 24, 2009, Brimer served Settling Defendant and various public enforcement agencies with a document entitled "Supplemental 60-Day Notice of Violation" that provided public enforcers and Settling Defendant with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn consumers that vinyl coated paper fasteners, vinyl coated measuring tapes, and vinyl coated craft wire, that Settling Defendant manufactured, distributed and/or sold exposed users in California to lead. To the best of the Parties' knowledge, no public enforcer has

1 commenced and is diligently prosecuting the allegations set forth in the Notices identified in
2 Section 1.5.

3 **1.6 Complaint and Amended Complaints**

4 On March 5, 2009, Brimer, acting in the interest of the general public in California, filed a
5 complaint in the Superior Court in and for the City and County of San Francisco, alleging
6 violations of Health & Safety Code § 25249.6 based on the alleged exposures to lead contained in
7 vinyl coated paper fasteners, vinyl coated measuring tapes, and/or vinyl coated craft wire,
8 manufactured, distributed and/or sold by the defendants in the action, including Settling
9 Defendant. This action shall hereinafter be referred to as the "Action." On March 12, 2009,
10 Brimer filed a First Amended Complaint ("FAC") in the Action.

11 On November 13 2009, Brimer filed a Second Amended Complaint ("SAC") in the
12 Action.

13 **1.7 No Admission**

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

26 **1.8 Consent to Jurisdiction**

27 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
28 jurisdiction over Settling Defendant as to the allegations contained in the SAC, that venue is

1 proper in the City and County of San Francisco, and that this Court has jurisdiction to enter and
2 enforce the provisions of this Consent Judgment.

3 **2. DEFINITIONS**

4 2.1 The term "Complaints" shall mean, collectively, the complaint, FAC, and SAC.

5 2.2 The term "Covered Products" means vinyl coated paper fasteners, vinyl coated
6 craft wire and vinyl coated measuring tapes.

7 2.3 The term "Compliance Date" means October 30, 2009.

8 2.4 The term "Effective Date" shall mean December 15, 2009.

9 2.5 The term "Notices" means the 60-Day Notice and Supplemental 60 Day Notice
10 identified in Section 1.5.

11 **3. INJUNCTIVE RELIEF: REFORMULATION**

12 3.1 **Vinyl Coated Paper Fasteners and Craft Wire.** After the Compliance Date,
13 Settling Defendant shall not sell, ship, or offer to be shipped for sale in California any vinyl
14 coated paper fastener with a vinyl coating that contains more than 300 parts per million ("ppm")
15 of lead. The fact that any such products are offered in a print catalog printed before the
16 Compliance Date shall not be deemed offering such products for sale in California.

17 3.2 **Vinyl Coated Measuring Tapes.** After the Compliance Date, Settling Defendant
18 shall not sell, ship, or offer to be shipped for sale in California any vinyl coated craft wire or vinyl
19 coated measuring tapes with a vinyl coating that contains more than 300 ppm of lead and yield
20 less than 1.0 micrograms of lead when using a wipe test pursuant to NIOSH Test Method 9100.
21 The fact that any such products are offered in a print catalog printed before the Compliance Date
22 shall not be deemed offering such products for sale in California.

23 **4. MONETARY PAYMENTS**

24 4.1 **Payments Pursuant to Health & Safety Code § 25249.7(b)**

25 Subject to the potential offsets described in Section 4.2 below, Settling Defendant shall
26 pay a total of \$20,000 in civil penalties to be apportioned in accordance with California Health &
27 Safety Code §25192, with 75% of these funds remitted to the State of California's Office of
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1 Environmental Health Hazard Assessment and the remaining 25% of these penalty monies
2 remitted to Brimer as provided by California Health & Safety Code §25249.12(d).

3 Settling Defendant shall issue two separate checks for this penalty payment: (a) one check
4 made payable to Chanler Law Group in Trust for the State of California's Office of Environmental
5 Health Hazard Assessment ("Chanler Law Group in Trust for OEHHA") in the amount of
6 \$15,000 for 75% of the total penalty required and (b) one check to "Chanler Law Group in Trust
7 for Russell Brimer" in the amount of \$5,000 for the remaining 25% of the total penalty required.
8 Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to
9 OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486). The second 1099 shall be
10 issued to Brimer, whose address and tax identification number shall be furnished, upon request, at
11 least five calendar days before payment is due. The payments shall be delivered on or before
12 seven days after the Effective Date, at the following address:

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

18 4.2 Settling Defendant may reduce the total penalty payment due pursuant to section
19 4.1 above by means of notifying Brimer's counsel in writing, not later than January 15, 2010, of
20 its election to exercise any or all of the following penalty offset options (in which event the
21 division of remaining total penalties due shall be proportioned between OEHHA and Brimer in
22 the same ratio as set forth in section 4.1 above):

23 (a) a 30% reduction in the total penalty amount (amounting to a \$6,000
24 reduction) due under section 4.1 above shall be realized if Settling Defendant agrees that, as of
25 January 1, 2010, the Reformulation Standards in sections 3.1 and 3.2 above shall be deemed to
26 mean less than or equal to 100 ppm of the Listed Chemical;

27 (b) another 10% reduction in the total penalty amount (amounting to a \$2,000
28 reduction) due under section 4.1 above shall be realized if Settling Defendant agrees that, as of
29 January 1, 2010, the term "in California" in sections 3.1 and 3.2 above shall be deemed to have
30 been replaced by the term "within the United States";

1 (c) another 30% reduction in the total penalty amount (amounting to a \$6,000
2 reduction) due under section 4.1 above shall be realized if Settling Defendant agrees that, as to any
3 Covered Products it shipped to California on or after July 1, 2008 with a vinyl coating containing
4 300 ppm of Lead or greater, it will, by no later than January 1, 2010, request that any such retailer or
5 distributor in California remove any remaining inventory of them from sale and return them for
6 replacements meeting the Reformulation Commitment set forth in sections 3.1 and 3.2 above at
7 Settling Defendant's expense, including with respect to any associated transportation costs, or affix
8 warnings provided by Settling Defendant on any remaining inventory, as the retailer or distributor's
9 option. To the extent applicable, Settling Defendant will specify the product name, product number,
10 and/or SKU number, for each product covered by the request.

11 **5. REIMBURSEMENT OF FEES AND COSTS**

12 **5.1 Attorney Fees and Costs**

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14 5.1.1 The parties reached an accord on the compensation due to Brimer and his
15 counsel under general contract principles and the private attorney general doctrine codified at
16 California Code of Civil Procedure (CCP) §1021.5, for all work performed through the mutual
17 execution of this agreement and approval by the trial court, excluding any fees on appeal.
18 Settling Defendant shall pay Brimer and his counsel a total of \$45,000 for fees and costs incurred
19 as a result of investigating, bringing this matter to Settling Defendant's attention, and litigating
20 and negotiating a settlement in the public interest.

21 5.1.2 Settling Defendant shall pay \$15,000 on or before December 21, 2009;
22 \$15,000 on or before February 15, 2010 and \$15,000 on or before April 15, 2010. All payments
23 shall be delivered to Brimer's counsel at the following address:

24 Chanler Law Group
25 Attn: Proposition 65 Controller
26 2560 Ninth Street
27 Parker Plaza, Suite 214
28 Berkeley, CA 94710-2565

6. CLAIMS COVERED AND RELEASE

6.1 Brimer's Release of Settling Defendant, and Its Chain of Distribution

1 6.1.1 This Consent Judgment is a full, final, and binding resolution between
2 Brimer and Settling Defendant, and its owners, subsidiaries, affiliates, employees, shareholders,
3 directors, insurers, attorneys, successors, and assigns (“Defendant Releasees”), and all entities to
4 whom they directly or indirectly distribute or sell Covered Products, including but not limited to
5 distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees
6 (“Downstream Defendant Releasees”) of any violation of Proposition 65 that has been or could
7 have been asserted against Defendant Releasees and Downstream Defendant Releasees regarding
8 the failure to warn about exposure to the Listed Chemical arising in connection with Covered
9 Products manufactured, sourced, distributed, or sold by Defendant Releasees prior to the
10 Compliance Date. Defendant Releasees’ compliance with this Consent Judgment shall constitute
11 compliance with Proposition 65 with respect to the Listed Chemical in Covered Products after the
12 Compliance Date.

13 6.1.2 Brimer on behalf of himself, his past and current agents, representatives,
14 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives
15 with respect to Covered Products all rights to institute or participate in, directly or indirectly, any
16 form of legal action and releases all claims, including, without limitation, all actions, and causes
17 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
18 penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and
19 attorneys’ fees) of any nature whatsoever, whether known or unknown, fixed or contingent
20 (collectively “claims”), against Defendant Releasees and Downstream Defendant Releasees that
21 arise under Proposition 65 or any other statutory or common law claims that were or could have
22 been asserted in the public interest, as such claims relate to Defendant Releasees’ and
23 Downstream Defendant Releasees’ alleged failure to warn about exposures to the Listed Chemical
24 contained in the Covered Products.

25 6.1.3 Brimer also, in his individual capacity only and not in his representative
26 capacity, provides a general release herein which shall be effective as a full and final accord and
27 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees,
28 damages, losses, claims, liabilities and demands of Brimer of any nature, character or kind,

1 known or unknown, suspected or unsuspected, arising out of the subject matter of the Complaints
2 as to Covered Products manufactured, distributed or sold by Defendant Releasees. Brimer
3 acknowledges that he is familiar with Section 1542 of the California Civil Code, which provides
4 as follows:

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

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

16 6.1.4 Upon court approval of the Consent Judgment, the Parties waive their
17 respective rights to a hearing or trial on the allegations of the Complaints.

18 6.1.5 The Parties further understand and agree that, except as provided for above,
19 this release shall not extend upstream to any third parties that manufactured the Covered Products
20 or any component parts thereof, or any distributors or suppliers who sold the Covered Products or
21 any component parts thereof to Settling Defendant.

22 **6.2 Settling Defendant's Release of Brimer**

23 6.2.1 Settling Defendant waives any and all claims against Brimer, his attorneys,
24 and other representatives for any and all actions taken or statements made (or those that could
25 have been taken or made) by Brimer and his attorneys and other representatives, whether in the
26 course of investigating claims or otherwise seeking enforcement of Proposition 65 against them in
27 this matter, and/or with respect to the Covered Products.

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1 6.2.2 Settling Defendant also provides a general release herein which shall be
2 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
3 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
4 Settling Defendant of any nature, character or kind, known or unknown, suspected or
5 unsuspected, arising out of the subject matter of the Action. Settling Defendant acknowledges
6 that it is familiar with Section 1542 of the California Civil Code, which provides as follows:

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

10 Settling Defendant expressly waives and relinquishes any and all rights and
11 benefits which it may have under, or which may be conferred on it by the provisions of
12 Section 1542 of the California Civil Code as well as under any other state or federal
13 statute or common law principle of similar effect, to the fullest extent that it may lawfully
14 waive such rights or benefits pertaining to the released matters. In furtherance of such
15 intention, the release hereby given shall be and remain in effect as a full and complete
16 release notwithstanding the discovery or existence of any such additional or different
17 claims or facts arising out of the released matters.

18 **7. SEVERABILITY**

19 If, subsequent to court approval of this Consent Judgment, any of the provisions of this
20 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
21 provisions remaining shall not be adversely affected, unless the Court finds that any
22 unenforceable provision is not severable from the remainder of the Consent Judgment.

23 **8. COURT APPROVAL**

24 This Consent Judgment is not effective until it is approved and entered by the Court and
25 shall be null and void if, for any reason, it is not approved and entered by the Court within nine
26 months after it has been fully executed by all Parties.

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1 **9. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the State of
3 California.

4 **10. NOTICES**

5 When any Party is entitled to receive any notice under this Consent Judgment, the notice
6 shall be sent by certified mail and electronic mail to the person(s) identified below. Any Party
7 may modify the person and address to whom the notice is to be sent by sending each other Party
8 notice by certified mail and/or other verifiable form of written communication.

9 To Kole Imports:

10 Jennifer Taggart, Esq.
11 DEMETRIOU, DEL GUERCIO, SPRINGER & FRANCIS, LLP
12 801 South Grand Avenue, Suite 1000
13 Los Angeles, California 90017-4613

14 To Dr. Held:

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

20 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

21 Brimer agrees to comply with the reporting form requirements referenced, in California
22 Health & Safety Code §25249.7(f) and to file a motion for approval of this Consent Judgment.

23 **12. MODIFICATION**

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

27 **13. ADDITIONAL POST-EXECUTION ACTIVITIES**

28 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed
motion is required to obtain judicial approval of this Consent Judgment. In furtherance of

1 obtaining such approval, Brimer and Settling Defendant and their respective counsel agree to
2 mutually employ their best efforts to support the entry of this agreement as a Consent Judgment
3 and obtain approval of the Consent Judgment by the Court in a timely manner.

4 **14. ENTIRE AGREEMENT**

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

11 **15. ATTORNEY'S FEES**

12 15.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
13 Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs
14 unless the unsuccessful Party has acted with substantial justification. For purposes of this
15 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
16 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, et seq.

17 15.2 Except as specifically provided in the above paragraph and in Section 5.1, each
18 Party shall bear its own costs and attorney's fees in connection with this action.

19 15.3 Nothing in this Section 15 shall preclude a Party from seeking an award of
20 sanctions pursuant to law.

21 **16. COUNTERPARTS, FACSIMILE SIGNATURES**

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

25 **17. AUTHORIZATION**

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

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AGREED TO:
Date: December 15, 2009

AGREED TO:
Date: December 21, 2009

By: 
Plaintiff Russell Brimer

By: 
Defendant Kole Imports

IT IS SO ORDERED.

Dated: _____

By _____
Judge of the Superior Court