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7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF MARIN - UNLIMITED JURISDICTION
10

11 RUSSELL BRIMER,) Case No. CIV1002452
12)
Plaintiff,)
13) **CONSENT JUDGMENT**
v.)
14 LUSTER LEAF, INC., *et al.*,)
15)
Defendant.)
16

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 Luster Leaf, Inc. (“Luster Leaf” or “Defendant”), with Plaintiff and
5 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, vinyl coated wire products that expose users to lead, without first providing “clear and
17 reasonable warning” under Proposition 65. Lead is listed as a reproductive and developmental
18 toxicant pursuant to Proposition 65 and is referred to hereinafter as the “Listed Chemical.” Vinyl
19 coated wire products that allegedly expose users to Lead are referred to herein as the “Products”.

20 **1.5 Notice of Violation**

21 On December 15, 2009, Brimer served Defendant and various public enforcement
22 agencies with a document entitled “60-Day Notice of Violation” that provided public enforcers
23 and Defendant with notice of alleged violations of Health & Safety Code § 25249.6 for failing to
24 warn consumers that vinyl coated wire that Defendant distributed and/or sold exposed users in
25 California to lead.

26 **1.6 Complaint**

27 On May 11, 2010, Brimer, acting in the interest of the general public in California, filed a
28 complaint in the Superior Court for the County of Marin, alleging violations of Health & Safety

1 Code § 25249.6 based on the alleged exposures to lead contained in vinyl coated wire distributed
2 and/or sold by Defendant. This action shall hereinafter be referred to as the “Action.”

3 **1.7 No Admission**

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

15 **1.8 Consent to Jurisdiction**

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

20 **2. INJUNCTIVE RELIEF: REFORMULATION**

21 **2.1 Vinyl Coated Wire.** After May 31, 2010 (the “Effective Date), Defendant shall
22 not sell, ship, or offer to be shipped for sale in California any vinyl coated wire with a vinyl
23 coating that contains more than 300 parts per million (“ppm”) of lead when analyzed pursuant to
24 Environmental Protection Agency (“EPA”) testing methodologies 3050B and 6010B or any other
25 method allowed by a federal or state agency to assess the content of lead in a solid substance.

26 **2.2 Products in the Stream of Commerce.** Defendant’s Products that have been
27 manufactured, distributed, shipped, sold, or that are otherwise in the stream of commerce prior to
28 the Effective Date shall be released from any claims that were brought or that could be brought by

1 Plaintiff in the Complaint against Defendant Releasees or Downstream Defendant Releasees as
2 those terms are defined in Section 5.1 below, and as further set forth therein.

3 **3. MONETARY PAYMENTS**

4 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

5 3.1.1 In settlement of all claims related to the Covered Products and Listed
6 Chemical referred to in the Complaint and this Consent Judgment, pursuant to Health & Safety
7 Code § 25249.7(b), Defendant shall pay \$1,000.00 in civil penalties.

8 3.1.2 Civil penalties are to be apportioned in accordance with California Health
9 & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of
10 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty
11 remitted to Brimer as provided by California Health & Safety Code §25249.12(d). Defendant
12 shall issue two separate checks for the penalty payment: (a) one check made payable to "The
13 Chanler Group in Trust for OEHHA" in an amount representing 75% of the total penalty; and (b)
14 one check to "The Chanler Group in Trust for Brimer" in an amount representing 25% of the total
15 penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box
16 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose information
17 shall be provided five (5) calendar days before the payment is due.

18 3.1.3 Payment shall be delivered to Brimer's counsel at the following address
19 within 10 days of the Effective Date:

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

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

24 **4.1 Attorney Fees and Costs**

25 4.1.1 The parties reached an accord on the compensation due to Brimer and his
26 counsel under general contract principles and the private attorney general doctrine codified at
27 California Code of Civil Procedure (CCP) §1021.5, for all work performed through the mutual
28

1 execution of this agreement and approval by the trial court, excluding any fees on appeal.
2 Defendant shall pay Brimer and his counsel a total of \$25,500.00 for fees and costs incurred as a
3 result of investigating, bringing this matter to Defendant's attention, and litigating and negotiating
4 a settlement in the public interest.

5 4.1.2 The payment shall be issued in a third separate check made payable to
6 "The Chanler Group" and shall be delivered to Brimer's counsel at the following address within
7 10 days of the Effective Date:

8 The Chanler Group
9 Attn: Proposition 65 Controller
10 2560 Ninth Street
11 Parker Plaza, Suite 214
12 Berkeley, CA 94710-2565

11 **5. CLAIMS COVERED AND RELEASE**

12 **5.1 Brimer's Release of Defendant and its Chain of Distribution**

13 5.1.1 This Consent Judgment is a full, final, and binding resolution between
14 Brimer, acting on behalf of himself and in the interest of the general public, and Defendant, its
15 owners, subsidiaries, affiliates, sister and related companies, employees, shareholders, directors,
16 insurers, attorneys, successors, and assigns ("Defendant Releasees"), and all entities to whom
17 they directly or indirectly distribute or sell Products, including but not limited to distributors,
18 wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Downstream
19 Defendant Releasees") of any violation of Proposition 65 or any statutory or common law claim
20 that has been or could have been asserted against Defendant Releasees and Downstream
21 Defendant Releasees individually or in the public interest regarding the failure to warn about
22 exposure to the Listed Chemical arising in connection with Products manufactured and/or
23 distributed prior to the Effective Date even if sold by Downstream Defendant Releasees after the
24 Effective Date. Defendant's compliance with this Consent Judgment shall constitute compliance
25 with Proposition 65 with respect to the Listed Chemical in Products for both Defendant Releasees
26 and Downstream Defendant Releasees for Products distributed and/or sold by Defendant after the
27 Effective Date.
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1 5.1.2 Brimer on behalf of himself, his past and current agents, representatives,
2 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives
3 with respect to Products all rights to institute or participate in, directly or indirectly, any form of
4 legal action and releases all claims, including, without limitation, all actions, and causes of action,
5 in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses,
6 or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of
7 any nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"),
8 against Defendant Releasees and Downstream Defendant Releasees that arise under Proposition
9 65 or any other statutory or common law claims that were or could have been asserted in the
10 public interest, as such claims relate to Defendant Releasees' and Downstream Defendant
11 Releasees' alleged failure to warn about exposures to the Listed Chemical contained in the
12 Products.

13 5.1.3 Brimer also, on behalf of himself, his past and current agents,
14 representatives, attorneys, successors, and/or assignees and not in his representative capacity,
15 provides a general release herein which shall be effective as a full and final accord and
16 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
17 damages, losses, claims, liabilities and demands of any nature, character or kind, known or
18 unknown, suspected or unsuspected, against Defendant Releasees and Downstream Defendant
19 Releasees arising under Proposition 65, as such claims relate to Defendant Releasees' alleged
20 failure to warn about exposures to or identification of any chemicals listed under Proposition 65
21 contained in any products sold by Defendant Releasees. Brimer acknowledges that he is familiar
22 with Section 1542 of the California Civil Code, which provides as follows:

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

27 Brimer, in his individual capacity only and *not* in his representative capacity, and on behalf of
28 himself, his past and current agents, representatives, attorneys, successors, and/or assignees
expressly waives and relinquishes any and all rights and benefits which he may have under, or

1 which may be conferred on him by the provisions of Section 1542 of the California Civil Code as
2 well as under any other state or federal statute or common law principle of similar effect, to the
3 fullest extent that he may lawfully waive such rights or benefits pertaining to the released matters.
4 In furtherance of such intention, the release hereby given shall be and remain in effect as a full
5 and complete release notwithstanding the discovery or existence of any such additional or
6 different claims or facts arising out of the released matters.

7 5.1.4 Upon court approval of the Consent Judgment, the Parties waive their
8 respective rights to a hearing or trial on the allegations of the Complaint.

9 5.1.5 The Parties further understand and agree that, except as provided for above,
10 this release shall not extend upstream to any third parties that manufactured the Products or any
11 component parts thereof, or any distributors or suppliers who sold the Products or any component
12 parts thereof to Defendant.

13 **5.2 Defendant's Release of Brimer**

14 5.2.1 Defendant waives any and all claims against Brimer, his attorneys, and
15 other representatives for any and all actions taken or statements made (or those that could have
16 been taken or made) by Brimer and his attorneys and other representatives, whether in the course
17 of investigating claims or otherwise seeking enforcement of Proposition 65 against them in this
18 matter, and/or with respect to the Products.

19 5.2.2 Defendant also provides a general release herein which shall be effective as
20 a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
21 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Defendant of any
22 nature, character or kind, known or unknown, suspected or unsuspected, arising out of the subject
23 matter of the Action. Defendant acknowledges that it is familiar with Section 1542 of the
24 California Civil Code, which provides as follows:

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

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

8 **6. SEVERABILITY**

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

13 **7. COURT APPROVAL**

14 This Consent Judgment is not effective until it is approved and entered by the Court and
15 shall be null and void if, for any reason, it is not approved and entered by the Court within nine
16 months after it has been fully executed by all Parties. In the event this consent judgment is (a)
17 not entered by this Court within nine months (or thereafter) for any reason whatsoever, or (b) is
18 entered by the Court and subsequently overturned by any appellate court, any monies that have
19 been provided to Brimer, or his counsel pursuant to Section 3 and/or Section 4 above, together
20 with interest at the prevailing federal rate accruing from the date of payment by Defendant, shall
21 be refunded within fifteen (15) days after receiving written demand from Defendant for return of
22 such funds.

23 **8. GOVERNING LAW**

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

1 **9. NOTICES**

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

4 To Defendant:
5 Larry Holbein
6 President
7 Luster Leaf Products, Inc.
8 2220 Tech Ct
9 Woodstock, IL 60098-9200

10 With copy to:
11 James Robert Maxwell, Esq.
12 Rogers Joseph O'Donnell
13 311 California Street
14 San Francisco, CA 94104

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

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

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

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

26 **11. MODIFICATION**

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

29 **12. ADDITIONAL POST-EXECUTION ACTIVITIES**

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

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

4 **13. 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
10 deemed to exist or to bind any of the parties.

11 **14. ATTORNEY'S FEES**

12 14.1 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 14.2 Except as specifically provided in the above paragraph and in Section 4.1 above,
18 each Party shall bear its own costs and attorney's fees in connection with this action.

19 **15. COUNTERPARTS, FACSIMILE SIGNATURES**

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

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1 **16. AUTHORIZATION**

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

5
6 **AGREED TO:**

7 Date: 7-17-10

8
9 By: 
10 Plaintiff Russell Brimer

AGREED TO:

Date: _____

By: _____
Larry Holbein, CEO
Luster Leaf, Inc.

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12 **IT IS SO ORDERED.**

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14 Dated: _____

By _____
Judge of the Superior Court

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16. AUTHORIZATION

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

AGREED TO:

Date: _____

By: _____
Plaintiff Russell Brimer

AGREED TO:

Date: 5/26/2010

By: 
Larry Holbein, CEO
Luster Leaf, Inc.

IT IS SO ORDERED.

Dated: _____

By _____
Judge of the Superior Court