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10 RUSSELL BRIMER

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

14 RUSSELL BRIMER,)
15)
16 Plaintiff,)
17)
18 v.)
19)
20 FLORACRAFT CORPORATION; and DOES)
21 1 through 150,)
22)
23 Defendants.)

Case No. RG10525081
[PROPOSED] CONSENT JUDGMENT
Dept:
Judge:
Date:
Complaint Filed: July 13, 2010

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 Floracraft Corporation (“Floracraft” 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 asserts that he seeks to
8 promote awareness of exposure to toxic chemicals and improve human health by reducing or
9 eliminating hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 Floracraft 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 Floracraft has manufactured, distributed and/or sold, in the State of
16 California, color-coated wire products that expose users to lead, without providing a warning
17 required under Proposition 65. Lead is listed as a reproductive and developmental toxicant
18 pursuant to Proposition 65. Color-coated wire products that allegedly expose users to lead are
19 referred to herein as the “Products.”

20 **1.5 Notice of Violation**

21 On December 15, 2009, Brimer served Floracraft and various public enforcement agencies
22 with a document entitled “60-Day Notice of Violation” that provided the recipients with notice of
23 alleged violations of Health & Safety Code § 25249.6 stating that Floracraft failed to warn
24 consumers that color-coated wire products that Floracraft distributed and/or sold exposed users in
25 California to lead. On June 9, 2011, Brimer served Floracraft, Dollar Tree, Inc., and various
26 public enforcement agencies with a document entitled “Supplemental 60-Day Notice of
27 Violation” that provided the recipients with notice of alleged violations of Health & Safety Code

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1 § 25249.6 stating that Floracraft and Dollar Tree failed to warn consumers that color-coated wire
2 products that Floracraft distributed and/or sold exposed users in California to lead.

3 **1.6 Complaint**

4 On July 13, 2010, Brimer, acting in the interest of the general public in California, filed a
5 complaint in the Superior Court for the County of Alameda, alleging violations of Health &
6 Safety Code § 25249.6 based on the alleged exposures to lead contained in color-coated wire
7 products distributed and/or sold by Floracraft (“Complaint” or “Action”).

8 **1.7 No Admission**

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

20 **1.8 Consent to Jurisdiction**

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

25 **1.9 Effective Date**

26 For purposes of this Consent Judgment, the term “Effective Date” shall mean July 30,
27 2011.

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2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS

2.1 Reformulation Commitment

As of the Effective Date, Floracraft shall only distribute or sell in California, or cause to be distributed for sale in California, Products that are Lead Free as defined below, or which contain the warnings required pursuant to Section 2.2 below. 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: (a) yield less than 1.0 microgram of lead when using a wipe test pursuant to NIOSH Test Method 9100; and (b) yield less than 100 parts per million ("ppm") lead when analyzed pursuant to EPA testing methodologies 3050B and 6010B, or equivalent methodologies utilized by federal or state agencies for the purpose of determining lead content in a solid substance. Products that are Lead Free are referred to hereinafter as "Reformulated Products."

2.2 Warnings Commitment

Except with respect to Reformulated Products, as of the Effective Date, Defendant shall provide Proposition 65-compliant warnings with respect to all Products shipped, sold, or offered for sale in California. The parties hereby acknowledge and agree that Floracraft already implemented a labeling program that uses the following language:

WARNING: This product contains chemicals known to the State of California to cause birth defects or other reproductive harm.

Therefore, the parties agree that Floracraft may continue to distribute, sell and/or offer to sell in California Products that already contain the above language. All Products not yet containing the above warning shall contain the specific language provided in Sections 2.2(a) below. Each warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which *specific* Product the

1 warning applies, so as to minimize the risk of consumer confusion. The warnings shall be
2 provided as follows:

3 (a) Product Labeling.

4 To the extent they do not address their obligations under this Consent Judgment through
5 timely reformulation, Floracraft shall address its warning obligation by affixing a warning to the
6 packaging of, or, if no packaging exists, directly on, each Additional Product sold in California
7 that states:

8 **WARNING:** This product contains chemicals, including
9 lead, known to the State of California to
10 cause cancer and birth defects or other
11 reproductive harm.

12 For Products sold by catalog or via the internet or by telephone, Floracraft shall allow the
13 consumer to return the Product for a full refund (including shipping costs for both the receipt and
14 the return of the product) within fifteen (15) days of his or her receipt of the Product. Floracraft
15 shall notify consumers of the above return policy in a reasonable manner, such as by placing a
16 link to the return policy in a conspicuous place on Floracraft's internet site, or by providing the
17 consumer with written information advising the consumer, in a conspicuous manner, of the return
18 policy.

19 **2.3 Exceptions To Warning Requirements**

20 The warning requirements set forth in Section 2.2 shall not apply to:

- 21 (i) Any Product shipped, distributed or sold by Floracraft before the Effective
22 Date; or
23 (ii) Reformulated Products (as defined in Section 2.1 above).

24 **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE §25249.7(b)**

25 **3.1 Civil Penalty.**

26 In settlement of all the claims referred to in this Consent Judgment against it,
27 Floracraft has been assessed a civil penalty in the amount of \$18,000. However, due to
28 Floracraft's good faith efforts to reduce lead content in the Products and proactive steps to
implement a warning program, Floracraft shall receive a credit of \$10,000. Therefore,

1 Floracraft shall make a civil penalty payment of \$8,000, to be apportioned in accordance with
2 California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of these funds remitted to
3 the State of California's Office of Environmental Health Hazard Assessment and the remaining
4 25% of the civil penalty remitted to Russell Brimer, as provided by California Health & Safety
5 Code § 25249.12(d). Floracraft shall issue two separate checks for the penalty payment: (a) one
6 check made payable to "The Chanler Group in Trust For the Office of Environmental Health
7 Hazard Assessment" in the amount of \$6,000, representing 75% of the total penalty; and (b) one
8 check to "The Chanler Group in Trust for Russell Brimer" in the amount of \$2,000,
9 representing 25% of the total penalty. Two separate 1099s shall be issued for the above
10 payments: (a) Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento,
11 CA, 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose address and tax identification
12 number shall be furnished, upon request, at least five (5) calendar days before the payment is
13 due. The payments shall be delivered to Brimer's counsel on or before the Effective Date, at
14 the following address:

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

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

21 **4.1 Attorney Fees and Costs**

22 **4.1.1** The Parties reached an accord on the compensation due to Brimer and his
23 counsel under general contract principles and the private attorney general doctrine codified at
24 California Code of Civil Procedure §1021.5. The Parties acknowledge that Brimer and his
25 counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to
26 be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the
27 agreement had been settled. Floracraft then expressed a desire to resolve the fee and cost issue
28 shortly after the other settlement terms had been finalized. Floracraft shall reimburse Brimer and
his counsel a total of \$44,500 for fees and costs incurred as a result of investigating, issuing the

1 60-Day Notice of Violation, bringing this matter to Floracraft's attention, litigating, and
2 negotiating a settlement in the public interest, as well as fees to be incurred in obtaining approval
3 by the trial court, excluding any fees on appeal.

4 **4.1.2** The payment shall be issued by check made payable to "The Chanler
5 Group" and shall be delivered to Brimer's counsel at the following address on or before the
6 Effective Date:

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

10 **5. CLAIMS COVERED AND RELEASE**

11 **5.1 Full Final and Binding Resolution of Proposition 65 Allegations**

12 This Consent Judgment is a full, final and binding resolution between Plaintiff, on behalf
13 of himself and the public, and Floracraft, of any violation of Proposition 65 that was or could
14 have been asserted by Plaintiff against Floracraft, its parents, subsidiaries, affiliated entities that
15 are under common ownership, directors, officers, employees, attorneys, and each entity to
16 whom Floracraft directly or indirectly distributes or sells Products, including but not limited to
17 downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members,
18 licensors, and licensees ("Releasees"), based on their failure to warn about alleged exposures to
19 lead contained in the Products that were distributed or sold by Floracraft.

20 **5.2 Plaintiff's Public Release of Proposition 65 Claims**

21 In further consideration of the promises and agreements herein contained, Plaintiff on
22 behalf of himself, his past and current agents, representatives, attorneys, successors, and/or
23 assignees, and in the interest of the general public, hereby waives all rights to institute or
24 participate in, directly or indirectly, any form of legal action and releases all claims, including,
25 without limitation, all actions, and causes of action, in law or in equity, suits, liabilities,
26 demands, obligations, damages, costs, fines, penalties, losses, or expenses -- including, but not
27 limited to, investigation fees, expert fees, and attorneys' fees, but exclusive of fees and costs on

1 appeal -- limited to and arising under Proposition 65 with respect to lead in the Products
2 distributed or sold by Floracraft (collectively "claims"), against Floracraft and Releasees.

3 **5.3 Plaintiff's Individual Release of Claims**

4 Plaintiff also, in his individual capacity only and not in his representative capacity,
5 provides a release herein which shall be effective as a full and final accord and satisfaction, as a
6 bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses,
7 claims, liabilities and demands of plaintiff of any nature, character or kind, whether known or
8 unknown, suspected or unsuspected, with respect to the Products distributed or sold by
9 Floracraft.

10 **5.4 Floracraft's Release of Plaintiff**

11 Floracraft on behalf of itself, its past and current agents, representatives, attorneys,
12 successors, and/or assignees, hereby waives any and all claims against Plaintiff, his attorneys
13 and other representatives, for any and all actions taken or statements made (or those that could
14 have been taken or made) by Plaintiff and his attorneys and other representatives, whether in the
15 course of investigating claims or otherwise seeking to enforce Proposition 65 against it, in this
16 matter with respect to the Products.

17 **6. SEVERABILITY**

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

22 **7. COURT APPROVAL**

23 This Consent Judgment is not effective until it is approved and entered by the Court and
24 shall be null and void if, for any reason, it is not approved and entered by the Court within nine
25 months after it has been fully executed by all Parties. In the event this consent judgment is (a)
26 not entered by this Court within nine months (or thereafter) for any reason whatsoever, or (b) is
27 entered by the Court and subsequently overturned by any appellate court, any monies that have
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1 been provided to Brimer, or his counsel pursuant to Section 3 and/or Section 4 above, together
2 with interest at the U.S. prime rate as published in the Wall Street Journal on the date of payment
3 by Floracraft and accruing from that date, shall be refunded within fifteen (15) days after
4 receiving written demand from Floracraft for return of such funds.

5 If this Consent Judgment is not entered by the Court, it will be of no force or effect and no
6 Party may introduce it into evidence or otherwise use it in any proceeding for any purpose.

7 **8. GOVERNING LAW**

8 The terms of this Consent Judgment shall be governed by the laws of the State of
9 California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
10 inapplicable by reason of law generally, or as to lead and/or the Products, then Defendant shall
11 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
12 that, the Products are so affected.

13 **9. NOTICES**

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

16 To Floracraft:

17 James Scatena, Chief Executive Officer
18 Floracraft Corporation
1 Longfellow Place
19 Ludington, MI 49431

20 With copy to:

21 Christopher J. Predko, Esq.
22 Warner Norcross & Judd LLP
900 Fifth Third Center
23 111 Lyon Street NW
Grand Rapids, MI 49503

To Brimer:

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

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

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

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

11. MODIFICATION

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

12. ADDITIONAL POST-EXECUTION ACTIVITIES

The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment, which Brimer shall draft and Floracraft shall join, such joinder being subject to Floracraft's approval of the motion, which approval shall not be unreasonably withheld. In furtherance of obtaining such approval, Brimer and Floracraft 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. If any third party objection to the noticed motion is filed, Brimer and Floracraft shall work together to file a joint reply and appear at any hearing before the Court. This provision is a material component of the Consent Judgment and shall be treated as such in the event of a breach. If the Superior Court does not approve the motion to approve this Consent Judgment, and if the parties choose not to pursue a modified Consent Judgment within 30 days after the Court's denial of the motion to approve, all payments made pursuant to this Consent Judgment will be returned.

1 **13. ENTIRE AGREEMENT**

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

8 **14. COUNTERPARTS, FACSIMILE SIGNATURES**

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

12 **15. AUTHORIZATION**

13 The undersigned are authorized to execute this Consent Judgment and have read,
14 understood, and agree to all of the terms and conditions of this Consent Judgment.

15 **AGREED TO:**

16 Date: 7-14-11
17 _____

18 
19 By: _____
20 Plaintiff, Russell Brimer

AGREED TO:

Date: _____

By: _____
James Scatena, Chief Executive Officer
Floracraft Corporation

21 **IT IS SO ORDERED.**

22 Dated: _____

23 By _____
24 Judge of the Superior Court

13.1 ENTIRE AGREEMENT

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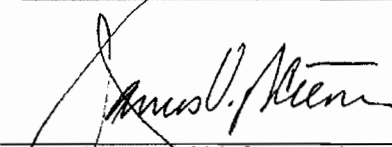
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16 **AGREED TO:**

17 Date: _____

18
19 By: _____
20 Plaintiff, Russell Brimer

AGREED TO:

Date: _____

By: 
James Scatena, Chief Executive Officer
Floracraft Corporation

21
22 **IT IS SO ORDERED.**

23
24 Dated: _____

By _____
Judge of the Superior Court