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6 RUSSELL BRIMER

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF ALAMEDA  
10 UNLIMITED CIVIL JURISDICTION  
11

12 RUSSELL BRIMER,

13 Plaintiff,

14 v.

15 CHARDON CORP.; TRUE VALUE  
16 COMPANY; and DOES 1-150, inclusive,

17 Defendants.

Case No. RG10543915

**[PROPOSED] CONSENT JUDGMENT**

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Consent Judgment is entered into by and between plaintiff, Russell Brimer,  
4 (“Brimer” or “Plaintiff”) and defendants, True Value Company and Chardon Corp. (collectively  
5 “Defendants”), with Plaintiff and Defendants 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 to improve human health by reducing or eliminating  
9 hazardous substances contained in consumer products.

10 **1.3 Defendants**

11 Defendants True Value and Chardon Corp. (“Chardon”) each employ ten or more  
12 individuals and are persons in the course of doing business for purposes of the Safe Drinking  
13 Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6 *et seq.*  
14 (“Proposition 65”).

15 **1.4 General Allegations**

16 Brimer alleges that Chardon and True Value each have manufactured, distributed, and/or  
17 sold in the State of California, Proman Tool Flashlights (hereinafter referred to as “Products”) that  
18 expose users to lead without first providing a “clear and reasonable warning,” as required by  
19 Proposition 65. Lead is listed as a reproductive and developmental toxicant pursuant to  
20 Proposition 65 and shall be referred to hereinafter as the “Listed Chemical.”

21 **1.5 Notices of Violation**

22 On July 1, 2010, Brimer served Chardon, True Value and various public enforcement  
23 agencies with a document entitled “60-Day Notice of Violation” that provided the public  
24 enforcers, Chardon and True Value with notice of alleged violations of Health & Safety Code §  
25 25249.6 for failing to warn consumers that the Products Chardon and True Value manufactured,  
26 distributed and/or sold exposed users in California to excessive amounts of the Listed Chemical.

27

28

1           **1.6     Complaint**

2           On October 27, 2010, Brimer, acting in a representative capacity in the interest of the  
3 general public in California, filed the instant action in the Superior Court for the County of  
4 Alameda alleging violations of Health & Safety Code § 25249.6 based on the exposures to the  
5 Listed Chemical contained in the Products manufactured, distributed, and/or sold by Chardon and  
6 True Value (“Complaint”).

7           **1.7     No Admission**

8           Defendants deny the material, factual, and legal allegations contained in the Notice and  
9 Complaint, and maintain that all of the products they have manufactured, distributed, and/or sold  
10 in California, including the Products, have been, and are, in compliance with all laws. Nothing in  
11 this Consent Judgment shall be construed as an admission by Defendants of any fact, finding,  
12 conclusion, issue of law, or violation of law, nor shall compliance with this Consent Judgment  
13 constitute or be construed as an admission by Defendants of any fact, finding, conclusion, issue of  
14 law, or violation of law, the same being specifically denied by Defendants. However, this Section  
15 shall not diminish or otherwise affect the Parties’ obligations, responsibilities, and/or duties under  
16 this Consent Judgment.

17           **1.8     Consent to Jurisdiction**

18           For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
19 jurisdiction over Defendants as to the allegations contained in the Complaint, that venue is proper  
20 in the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions  
21 of this Consent Judgment pursuant to California Code of Civil Procedure § 664.6.

22           **1.9     Effective Date**

23           For purposes of this Consent Judgment, the term “Effective Date” shall mean March 31,  
24 2011.

25 **2.     INJUNCTIVE RELIEF**

26           **2.1     Reformulation**

27           As of the Effective Date, Defendants shall not sell or offer for sale in California any  
28 Products (as that terms is defined in paragraph 1.4 above) that are not Lead Free. For purposes

1 of this Consent Judgment, "Lead Free" Products shall mean Products that contain no more than  
2 100 ppm of lead when analyzed pursuant to Environmental Protection Agency testing  
3 methodologies 3050B or equivalent methods and yield no more than 1.0 micrograms of lead  
4 when analyzed pursuant to NIOSH Test Method 9100 performed on any accessible component  
5 (i.e. any component part that may be handled, touched or mouthed during the reasonably  
6 foreseeable use or misuse by a consumer).

7 **3. MONETARY PAYMENTS**

8 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

9 In settlement of all the claims related to the Products and the Listed Chemical referred to  
10 in the Complaint and this Consent Judgment against it, Defendants shall collectively pay a civil  
11 penalty of \$2,500 to be apportioned in accordance with Health & Safety Code § 25249.12 (c)(1)  
12 and (d), with 75% of these funds remitted to the State of California's Office of Environmental  
13 Health Hazard Assessment and the remaining 25% of these penalty monies remitted to Brimer  
14 as provided by Health & Safety Code § 25249.12(d).

15 Defendants shall issue two checks for the penalty payment: (a) one check made payable  
16 to "The Chanler Group in Trust for Office of Environmental Health Hazard Assessment" in the  
17 amount of \$1,875, and (b) one check to "The Chanler Group in Trust for Russell Brimer" in the  
18 amount of \$625. Two 1099s shall be issued for the above payments to: (a) Office of  
19 Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-  
20 0284486); and (b) Russell Brimer, whose address and tax identification number shall be  
21 furnished, upon request. All payments shall be delivered to the following address on or before  
22 May 6, 2011:

23  
24 The Chanler Group  
25 Attn: Proposition 65 Controller  
26 2560 Ninth Street, Suite 214  
27 Berkeley, CA 94710  
28

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

2 **4.1 Attorney Fees and Costs**

3 The parties acknowledge that Brimer and his counsel offered to resolve this dispute  
4 without reaching terms on the amount of attorney fees and costs to be reimbursed to them, thereby  
5 leaving the fee issue to be resolved after the material terms of the agreement had been settled.  
6 Defendants then expressed a desire to resolve the fee and cost issue shortly after the other  
7 settlement terms had been finalized. The parties then attempted to (and did) reach an accord on  
8 the compensation due to Brimer and his counsel under general contract principles and the private  
9 attorney general doctrine codified at California Code of Civil Procedure § 1021.5, for all work  
10 performed through the mutual execution of this agreement and entry of this Consent Judgment,  
11 except for fees on appeal. Defendants shall pay the total amount of \$31,500 for all fees and costs  
12 relating to the Notice, Complaint, and this Consent Judgment, including, without limitation,  
13 investigating, bringing this matter to Defendants' attention, litigating and negotiating a settlement  
14 in the public interest, and future fees and costs related to preparing and filing a Motion to  
15 Approve Consent Judgment, not including any fees and costs of appeal.

16 Payment shall be made to "The Chanler Group" at the following address on or before May  
17 6, 2011:

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

21 Defendants shall issue a 1099 form to The Chanler Group (EIN: 94-3171522) for the  
22 payment made pursuant to this section.

23 **5. RELEASE OF ALL CLAIMS**

24 **5.1 Brimer's Release of Defendants**

25 In further consideration of the promises and agreements herein contained, and for the  
26 payments to be made pursuant to Sections 3.1 and 4.1 above, Brimer, on behalf of himself, his  
27 past and current agents, representatives, attorneys, successors, and/or assignees, and in the interest  
28 of the general public, hereby waives all rights to institute or participate in, directly or indirectly,

1 any form of legal action and releases all claims, including, without limitation, all actions, and  
2 causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,  
3 penalties, losses or expenses of any nature whatsoever (collectively “Claims”), against  
4 Defendants and each of their downstream distributors, wholesalers, licensors, licensees,  
5 auctioneers, retailers, franchisees, dealers, customers, owners, purchasers, users, parent  
6 companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys,  
7 representatives, shareholders, agents, and employees, and sister and parent entities (collectively  
8 “Releasees”). This release is limited to those claims that arise under Proposition 65 as such  
9 claims relate to Defendants’ alleged failure to warn about exposures to or identification of the  
10 Listed Chemical contained in the Products. The Parties further understand and agree that this  
11 release shall not extend upstream to any entities that manufactured the Products or any component  
12 parts thereof, or to any distributors or suppliers who sold Products or any component parts thereof  
13 to Defendants. However, to the extent that True Value is upstream from Chardon in the chain of  
14 distribution, or vice versa, the exclusion in the preceding sentence does not apply to exclude the  
15 release of either Defendant and/or the intermediary distributors or suppliers between the two  
16 Defendants, as related to the Listed Chemical in the Products.

17 Brimer also, on behalf of himself and his agents, attorneys, representatives, successors and  
18 assigns, in his individual capacity only and *not* in his representative capacity, provides a general  
19 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all  
20 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,  
21 liabilities and demands of Brimer of any nature, character, or kind, known or unknown, suspected  
22 or unsuspected, and agrees not to initiate, participate in, or maintain any further legal action in  
23 any judicial or administrative forum, including any Claim against Defendants and Releasees  
24 arising from any alleged violations of Proposition 65 with respect to the Listed Chemical in the  
25 Products.

## 26 **5.2 Defendants’ Release of Brimer**

27 Defendants waive any and all claims against Brimer, his attorneys, and other  
28 representatives for any and all actions taken or statements made (or those that could have been

1 taken or made) by Brimer and his attorneys and other representatives, whether in the course of  
2 investigating claims or otherwise seeking enforcement of Proposition 65 against them in this  
3 matter, and/or with respect to the Products.

#### 4 **5.3 Waiver of Unknown Claims.**

5 With respect to the releases in this Agreement, and pursuant to Section 1542 of the Civil  
6 Code of the State of California or under any other similar state or federal statute or under any  
7 common law principle of similar effect, Plaintiff expressly waives any and all rights that it may  
8 have against the Releasees, and Defendants expressly waive any and all rights that they may have  
9 against Plaintiff related to the Claims in this Agreement. The consequences of such waiver have  
10 been explained to the Plaintiff and Defendants who each represent that it fully understands the  
11 consequences of such waiver. California Civil Code Section 1542 states as follows:

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

17 Plaintiff and Defendants acknowledge that they each may subsequently discover facts  
18 different from, or in addition to, those that it now knows or believes to be true with respect to the  
19 Claims released herein and agrees that the settlement, this Agreement and the releases contained  
20 herein shall be and remain effective in all respects notwithstanding the discovery of such different  
21 or additional facts.

#### 22 **6. SEVERABILITY**

23 If, subsequent to Court approval of this Consent Judgment, any of the provisions  
24 contained herein are held by a court to be unenforceable, the validity of the enforceable provisions  
25 remaining shall not be adversely affected.

#### 26 **7. COURT APPROVAL**

27 This Consent Judgment is not effective until it is approved and entered by the Court and  
28 shall be null and void if, for any reason, it is not approved and entered by the Court within twelve  
months after it has been fully executed by all Parties. If the Superior Court does not approve the

1 motion to approve this Consent Judgment within one-year of execution, all payments made by  
2 Defendants shall be returned to counsel for Defendants.

3 **8. GOVERNING LAW**

4 The terms of this Consent Judgment shall be governed by the laws of the State of  
5 California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by  
6 reason of law generally, or as to the Products, then Defendants shall provide written notice to  
7 Brimer of any asserted change in the law, and shall have no further obligations pursuant to this  
8 Consent Judgment with respect to, and to the extent that, the Products are so affected.

9 **9. NOTICES**

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

12 To Defendants:

13 Lucas Novak, Esq.  
14 Clinton & Clinton  
15 100 Oceangate, Suite 1400  
16 Long Beach, CA 90802

To Brimer:

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

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

19 **10. ADDITIONAL POST-EXECUTION ACTIVITIES**

20 Brimer agrees to comply with the reporting form requirements referenced, in California  
21 Health & Safety Code §25249.7(f) and to file a motion for approval of this Consent Judgment.  
22 The Parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed motion is  
23 required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such  
24 approval, Brimer, Defendants and their respective counsel agree to mutually employ their best  
25 efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the  
26 Consent Judgment by the Court in a timely manner. Brimer shall prepare and file all documents  
27 necessary to obtain court approval of this Consent Judgment. For purposes of this paragraph, best  
28 efforts shall include, at a minimum, cooperating on the drafting and filing any papers in support  
of the required motion for judicial approval.



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. ENTIRE AGREEMENT**

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

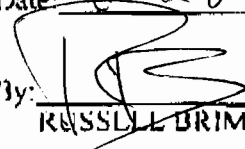
12 **13. COUNTERPARTS, FACSIMILE SIGNATURES**

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

16 **14. AUTHORIZATION**

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

20 **AGREED TO:**

21 Date: 6-22-11  
22 By:   
23 **RUSSELL BRIMER**

**AGREED TO:**

Date: \_\_\_\_\_  
By: \_\_\_\_\_  
**TRUE VALUE COMPANY**

**AGREED TO:**

25 Date: 6/3/11

27 By:   
**GORDON CORR**

28

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.

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

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14 document format (PDF), each of which shall be deemed an original, and all of which, when taken  
15 together, shall constitute one and the same documents.

16 **14. AUTHORIZATION**

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

20 **AGREED TO:**

21 Date: \_\_\_\_\_

22 By: \_\_\_\_\_  
23 RUSSELL BRIMER

**AGREED TO:**

Date: \_\_\_\_\_

By:   
TRUE VALUE COMPANY

**AGREED TO:**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
CHARDON CORP.

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