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12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 FOR THE CITY AND COUNTY OF SAN FRANCISCO
15 UNLIMITED CIVIL JURISDICTION

16
17 RUSSELL BRIMER,
18 Plaintiff,
19 v.
20 HOWARD BERGER COMPANY INC, *et al.*,
21 Defendants.

Case No. CGC-10-505118

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Howard Berger Company**

3 This Consent Judgment is entered into by and between Plaintiff Russell Brimer (hereinafter
4 “Brimer” or “Plaintiff”) and Defendant Howard Berger Company Inc. (hereinafter “HBC” or
5 “Defendant”), with Brimer and HBC collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 HBC employs ten or more persons and is a person in the course of doing business for purposes
12 of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code
13 Section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that HBC has manufactured, distributed and/or sold in the State of California
16 work lights with clamp handles containing lead. Lead is listed pursuant to the Safe Drinking Water
17 and Toxic Enforcement Act of 1986, California Health & Safety Code § § 25249.5 *et seq.*
18 (“Proposition 65”), as a chemical known to the State of California to cause birth defects and other
19 reproductive harm. Lead is referred to hereinafter as the “Listed Chemical.”

20 **1.5 Product Description**

21 The products that are covered by this Consent to Judgment are defined as follows: Work lights
22 with clamp handles containing the Listed Chemical, including but not limited to, *H.B. Smith Tools 3*
23 *Way Work Light, WL250 (#0 75877 22512 6)*. All such items shall hereinafter be referred to as the
24 “Products.”

25 **1.6 Notice of Violation**

26 On August 5, 2010, Brimer served HBC and various public enforcement agencies with a
27 document entitled “60-Day Notice of Violation” that provided HBC and such public enforcers with
28 notice that alleged that HBC was in violation of California Health & Safety Code Section 25249.6 for

1 failing to warn consumers and customers that the Products exposed users in California to the Listed
2 Chemical. To the best of the Parties' knowledge, no public enforcer has diligently prosecuted the
3 allegations set forth in the 60-Day Notice of Violation ("Notice").

4 **1.7 Complaint**

5 On November 4, 2010, Brimer, acting, in the interest of the general public in California, filed a
6 complaint in the Superior Court in and for the City and County of San Francisco, alleging violations
7 by HBC of Health & Safety Code Section 25249.6 based, *inter alia*, on the alleged exposures to the
8 Listed Chemical contained in the Products manufactured, distributed and/or sold by HBC (the
9 "Action").

10 **1.8 No Admission**

11 HBC denies the material, factual, and legal allegations contained in Brimer's Notice, and
12 expressly denies any wrongdoing whatsoever. HBC further maintains that all products manufactured,
13 distributed and/or sold by it in California, including the Products, have been, and are, in compliance
14 with all laws. Nothing in this Consent Judgment shall be construed as an admission by HBC of any
15 fact, finding, issue of law, or violation of law; nor shall compliance with this Consent Judgment
16 constitute or be construed as an admission by HBC of any fact, finding, conclusion, issue of law, or
17 violation of law, such being specifically denied by HBC. However, this Section shall not diminish or
18 otherwise affect the obligations, responsibilities and duties of HBC under this Consent Judgment.

19 **1.9 Consent to Jurisdiction**

20 For purposes of this Consent Judgment only, the parties stipulate that this Court has
21 jurisdiction over HBC as to the allegations contained in the Complaint, that venue is proper in the
22 County of San Francisco, and that this Court has jurisdiction to enter and enforce the provisions of
23 this Consent Judgment pursuant to Code of Civil Procedure Section 664.6.

24 **1.10 Effective Date**

25 For purposes of this Consent Judgment, the term "Effective Date" shall mean February 4,
26 2011.

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28 ////

1 **2. INJUNCTIVE RELIEF: REFORMULATION**

2 **2.1 Reformulation Commitment**

3 Commencing on the Effective Date, HBC shall not ship, sell or offer to be shipped for sale in
4 California any Product unless such Product is Lead Free. For purposes of this Consent Judgment,
5 “Lead Free” shall mean products containing less than or equal to 100 parts per million (“ppm”) of the
6 Listed Chemical when analyzed pursuant to EPA testing methodologies, 3050B and 6010B, or
7 equivalent methods as may be allowed under Proposition 65. Products that are Lead Free are referred
8 to hereinafter as “Reformulated Products.”

9 **2.2 Requirements for Products Remaining in Inventory in California**

10 To the best of HBC’s knowledge and upon diligent investigation, there are no Products
11 manufactured, distributed or sold before the Effective Date that are not Lead Free and remain in
12 inventory with retailers and distributors for sale in California. To the extent that HBC, upon diligent
13 investigation, becomes aware that such Products do remain in inventory with retailers and distributors
14 for sale in California, HBC must either provide Proposition 65 warnings or request that the retailer or
15 distributor return the unsold Products to HBC. HBC hereby agrees that, within thirty (30) days of the
16 Effective Date, it will send a letter, via certified mail with a copy to counsel for plaintiff, to each
17 California retailer or distributor that is known or believed to have any inventory of the Products. The
18 letter shall explain, in detail, the retailer’s or distributor’s duty to provide clear and reasonable
19 warnings for the Products, in compliance with Proposition 65, and either:

- 20 (a) include a sufficient number of warning stickers containing the following
21 language:

22 **WARNING:** This product contains LEAD, a chemical
23 known to the State of California to cause
24 birth defects and other reproductive harm
Please wash hands after use..

25 with instructions that the stickers be placed on the product packaging for those Products that remain
26 on the sales floor of the retailer or are otherwise in inventory at the store or distribution facility. The
27 instructions shall advise retailers and distributors that warning stickers issued for Products shall be
28 prominently placed with such conspicuousness as compared with other words, statements, designs or

1 devices as to render it likely to be read and understood by an ordinary individual under customary
2 conditions before purchase; or

3 (b) request that the retailer or distributor return Products remaining in inventory in
4 California, if any, to HBC, and state that HBC will pay for shipping of the returned product.

5 As part of the instructions under either options (a) or (b), HBC must specify the product name,
6 product number, and SKU number, if available, for each Product covered by the instruction letter.

7 HBC shall maintain records of all compliance correspondence or other communications generated
8 pursuant to this Section for two (2) years from the Effective Date, and shall produce copies of such
9 records upon written request by Brimer.

10 **3. MONETARY PAYMENTS**

11 **3.1 Payments Pursuant to Health & Safety Code Section 25249.7(b)**

12 Pursuant to Health & Safety Code Section 25249.7(b), and in settlement of all the claims
13 referred to in this Consent Judgment, HBC shall pay a total of \$28,000 in civil fines in two
14 installments. The first payment of the penalty shall be \$7,000, to be apportioned in accordance with
15 California Health & Safety Code Section 25192, with 75% of these funds remitted to the State of
16 California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25%
17 remitted to Brimer as provided by California Health & Safety Code Section 25249.12(d).

18 HBC shall issue two separate checks for each of the payments: (a) one check made payable
19 to The Chanler Group in Trust for the State of California's Office of Environmental Health Hazard
20 Assessment (OEHHA) in the amount of \$5,250, representing 75% of the total; and (b) one check to
21 The Chanler Group in Trust for Brimer in the amount of \$1,750, representing 25% of the total.

22 Two separate Forms 1099 shall be issued for the above payments: The first Form 1099 shall be
23 issued to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of
24 \$5,250. The second Form 1099 shall be issued in the amount of \$1,750 to Brimer, whose address
25 and tax identification number shall be furnished, upon execution of this Agreement. The payment
26 shall be made payable to The Chanler Group and shall be delivered within ten (10) days of the
27 Effective Date, at the following address:

28 //

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

6 The second payment of \$21,000 in civil fines is due on March 30, 2011; however this
7 amount shall be waived in its entirety if HBC certifies (in writing to Brimer by March 15, 2011) that
8 it (i) has met the Reformulation Commitment as of the Effective Date, or (ii) no longer
9 manufactures, distributes and/or sells the Product with the Listed Chemical in the State of California
10 as of the Effective Date. If the certification is not received, then the additional civil fines shall be
11 apportioned in the same manner outlined above in this Paragraph.

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

13 **4.1 Attorney Fees and Costs**

14 The parties acknowledge that Brimer and his counsel offered to resolve this dispute without
15 reaching terms on the amount of attorney fees and costs to be reimbursed to them, thereby leaving the
16 fee issue to be resolved after the material terms of the agreement had been settled. HBC then
17 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
18 finalized. The parties then attempted to (and did) reach an accord on the compensation due to Brimer
19 and his counsel under general contract principles and the private attorney general doctrine codified at
20 California Code of Civil Procedure (CCP) Section 1021.5, for all work performed through the mutual
21 execution of this agreement and for Brimer's anticipated future fees and costs including attorneys'
22 fees to be incurred in seeking judicial approval of this Consent Judgment as well as any other legal
23 work performed after the execution of this Consent Judgment in an effort to obtain finality of the
24 Action. HBC shall reimburse Brimer and his counsel the total of \$30,500 for fees and costs incurred
25 as a result of investigating, bringing this matter to HBC's attention, and litigating and negotiating a
26 settlement in the public interest through the execution of this Agreement. HBC shall also reimburse
27 Brimer and his counsel the total of \$7,500 for all anticipated post-execution work, such as fulfilling
28 reporting requirements, preparation and filing of the motion to approve this proposed Consent
Judgment, and the preparation, service and filing of the notice of entry of judgment. HBC shall issue
a separate Form 1099 for fees and costs (EIN: 94-3171522) and shall make the check in the amount of

1 \$38,000 payable to "The Chanler Group" and shall deliver the check within ten (10) days of the
2 Effective Date, to the following address:

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

8 **5. RELEASE OF ALL CLAIMS**

9 **5.1 Brimer's Release of HBC**

10 In further consideration of the promises and agreements herein contained, and for the
11 payments to be made pursuant to Sections 3 and 4 above, Brimer, on behalf of himself, his past and
12 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
13 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of
14 legal action and releases all claims, including, without limitation, all actions, and causes of action, in
15 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or
16 expenses (including, but not limited to, investigation fees, expert fees and attorney fees) of any nature
17 whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against HBC
18 and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers,
19 franchisees, dealers, customers (including, but not limited to, Michael's Stores, Inc., and its affiliates
20 and/or subsidiaries), owners, purchasers, users, parent companies, corporate affiliates, subsidiaries,
21 and their respective officers, directors, attorneys, representatives, shareholders, agents, and
22 employees, and sister and parent entities (collectively "Releasees"). This release is limited to those
23 claims that arise under Proposition 65, as such claims relate to HBC's alleged failure to warn about
24 exposures to or identification of the Listed Chemical contained in the Products.

25 Brimer also, on behalf of himself and his agents, attorneys, representatives, successors and
26 assigns, in his individual capacity only and not in his representative capacity, provides a general
27 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
28 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
liabilities and demands of Brimer of any nature, character or kind, known or unknown, suspected or
unsuspected, and agrees not to initiate, participate in or maintain any further legal action in any

1 judicial or administrative forum, including any Claim, against HBC arising from any alleged
2 violations of Proposition 65 with respect to the Listed Chemical in the Products. Brimer
3 acknowledges that he is familiar with Section 1542 of the California Civil Code, which provides as
4 follows:

5 A general release does not extend to claims which the creditor does not know or
6 suspect to exist in his or her favor at the time of executing the release, which if known
by him or her must have materially affected his settlement with the debtor.

7 Brimer, in his individual capacity only and *not* in his representative capacity, on behalf of
8 himself and his agents, attorneys, representatives, successors and assigns, expressly waives and
9 relinquishes any and all rights and benefits that he may have under, or that may be conferred on him
10 by, the provisions of Section 1542 of the California Civil Code as well as under any other state or
11 federal statute or common law principle of similar effect, to the fullest extent that he may lawfully
12 waive such rights or benefits pertaining to the released matters.

13 The Parties further understand and agree that this release shall not extend upstream to any
14 entities that manufactured the Products for HBC or any component parts thereof or to any distributors
15 or suppliers who sold the Products or any component parts thereof to HBC.

16 **5.2 HBC's Release of Brimer**

17 HBC waives any and all claims against Brimer, his attorneys, and other representatives for any
18 and all actions taken or statements made (or those alleged to have been taken or made) by Brimer and
19 his attorneys and other representatives in the course of investigating claims or otherwise seeking
20 enforcement of Proposition 65 against them in this matter with respect to the Products.

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

27 A general release does not extend to claims which the creditor does not know or
28 suspect to exist in his or her favor at the time of executing the release, which if known
by him or her must have materially affected his settlement with the debtor.

1 HBC expressly waives and relinquishes any and all rights and benefits that it may have under,
2 or that may be conferred on it by, the provisions of Section 1542 of the California Civil Code as well
3 as under any other state or federal statute or common law principle of similar effect, to the fullest
4 extent that it may lawfully waive such rights or benefits pertaining to the released matters.

5 **6. COURT APPROVAL**

6 This Consent Judgment is not effective until it is approved and entered by the Court and shall
7 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
8 has been fully executed by all parties, in which event any monies that have been provided to Brimer,
9 or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen (15) days
10 after receiving written notice from HBC that the one-year period has expired.

11 **7. SEVERABILITY**

12 If, subsequent to the execution of this Consent Judgment, any of the provisions of this Consent
13 to Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
14 remaining shall not be adversely affected.

15 **8. GOVERNING LAW**

16 The terms of this Consent Judgment shall be governed by the laws of the State of California
17 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise
18 rendered inapplicable by reason of law generally, or as to the Products, then HBC shall provide
19 written notice to Brimer of any asserted change in the law, and shall have no further obligations
20 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

21 **9. NOTICES**

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

26 ////

27 ////

28 ////

1 For HBC:

2 James P. Brower
3 Chief Executive Officer
4 Howard Berger Company Inc.
5 324A Half Acre
6 Cranbury, NJ 08512

7 with a copy to:

8 Joshua A. Bloom
9 Barg Coffin Lewis & Trapp LLP
10 350 California Street, 22nd Floor
11 San Francisco, CA 94104-1435

12 For Brimer:

13 Proposition 65 Coordinator
14 The Chanler Group
15 2560 Ninth Street
16 Parker Plaza, Suite 214
17 Berkeley, CA 94710

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

20 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

21 This Consent Judgment may be executed in counterparts and by facsimile, each of which shall
22 be deemed an original, and all of which, when taken together, shall constitute one and the same
23 document.

24 **11. COMPLIANCE WITH HEALTH & SAFETY CODE Section 25249.7(f)**

25 Brimer agrees to comply with the reporting form requirements referenced in California Health
26 & Safety Code Section 25249.7(f).

27 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

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

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1 **13. MODIFICATION**

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

5 **14. AUTHORIZATION**

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

8
9 **AGREED TO:**

AGREED TO:

10 Date: _____

Date: _____

11
12 By: _____
RUSSELL BRIMER

By: _____
JAMES P. BROWER
HOWARD BERGER COMPANY INC.

13
14
15 **APPROVED AS TO FORM:**

APPROVED AS TO FORM:

16 Date:
17 THE CHANLER GROUP

Date:
BARG COFFIN LEWIS & TRAPP LLP

18
19 By: _____
20 Stephen S. Sayad
21 Attorneys for Plaintiff
RUSSELL BRIMER

By: _____
Joshua A. Bloom
Attorneys for Defendant
HOWARD BERGER COMPANY INC..

FEB. 1. 2011 2:45PM CHANLER LAW GROUP 510-848-8118

NO. 508 P. 2

13. MODIFICATION

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

14. 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 hereof.

AGREED TO:

AGREED TO:

Date: 2-1-11

Date:

By: RUSSELL BRIMER

By: JAMES P. BROWER
HOWARD BERGER COMPANY INC.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Date: THE CHANLER GROUP

Date: BARG COFFIN LEWIS & TRAPP LLP

By: Stephen S. Sayad
Attorneys for Plaintiff
RUSSELL BRIMER

By: Joshua A. Bloom
Attorneys for Defendant
HOWARD BERGER COMPANY INC..

1 **13. MODIFICATION**

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

5 **14. AUTHORIZATION**

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

9 **AGREED TO:**

10 Date: _____

11
12 By: _____
13 RUSSELL BRIMER

AGREED TO:

Date: February 1, 2011

14
15 By: _____
16 JAMES P. BROWER
17 HOWARD BERGER COMPANY INC.

15 **APPROVED AS TO FORM:**

16 Date: _____

17 THE CHANLER GROUP
18
19 By: _____
20 Stephen S. Sayad
21 Attorneys for Plaintiff
22 RUSSELL BRIMER

APPROVED AS TO FORM:

Date: 2/1/11

18 BARG COFFIN LEWIS & TRAPP LLP
19
20 By: _____
21 Joshua A. Bloom
22 Attorneys for Defendant
23 HOWARD BERGER COMPANY INC..

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