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

11 RUSSELL BRIMER,
12

13 Plaintiff,

14 v.

15 OMAHA DISTRIBUTING CO., INC., et al;
16

Defendants.

Case No. RG11575578

[PROPOSED] CONSENT JUDGMENT

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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer
4 (“Brimer”), John Moore¹ (“Moore”)(with Moore and Brimer referred to collectively as the
5 “Plaintiffs”) and defendant Omaha Distributing Co., Inc. (“Omaha” or “Defendant”), with
6 Plaintiffs and Defendant collectively referred to as the “Parties” and each individually referred to
7 as a “Party.”

8 **1.2 Plaintiffs**

9 Brimer is an individual residing in California who seeks to promote awareness of
10 exposure to toxic chemicals and improve human health by reducing or eliminating hazardous
11 substances in consumer products. Moore is an individual residing in California who seeks to
12 promote awareness of exposure to toxic chemicals and improve human health by reducing or
13 eliminating hazardous substances in consumer products.

14 **1.3 Defendant**

15 Omaha is a distributor based in Nebraska, employs ten or more persons and is a person in
16 the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement
17 Act of 1986, California Health & Safety Code § 25249.6 *et seq.* (“Proposition 65”). Omaha does
18 not have a place of business in the State of California; however, Omaha does distribute and ship
19 products into the State of California for sale to California consumers.

20 **1.4 General Allegations**

21 Plaintiffs allege that Omaha manufactured, imported, distributed, sold and/or offered for
22 sale in the State of California without the health hazard warnings required by Proposition 65 the
23 following products: (1) tape measures with grips and hand straps containing lead; (2) vinyl/PVC
24 hand tool grips containing di(2-ethylhexyl)phthalate (“DEHP”) and lead; and (3) glue guns with
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26 _____
27 ¹ Mr. Moore is a party to the settlement but not a party to the action. Moore agrees to dismiss the action known as
28 Moore v. Giovanetti, Inc. SCAC Case Number HG13671767 with prejudice within five business days of the mutual
execution of this Agreement.

1 vinyl/PVC cords containing DEHP and lead. Lead and DEHP are listed pursuant to Proposition
2 65 as known to the State of California to cause birth defects and other reproductive harm.

3 **1.5 Product Description**

4 The products that are covered by this Consent Judgment are defined as: (1) tape measures
5 with grips and hand straps containing lead including, but not limited to, the *Omaha Distributing*
6 *3/4" x 16' Tape Measure, #07030 (#0 97427 07030 3)*; (2) vinyl/PVC hand tool grips containing
7 DEHP and/or lead including, but not limited to, the *Omaha Distributing 6 in 1 Screwdriver,*
8 *#07034 (#0 97427 07034 1)* and the *Black & Sage Hi-Viz Hot Neon 6" Diagonal Pliers, #807*
9 *(#7 04673 79807 2)*; and (3) glue guns with vinyl/PVC cords containing DEHP and/or lead
10 including, but not limited to, the *Tool Mart Hot Melt Glue Gun 110 V, Item# 10551 (#6 43117*
11 *10551 2)*, which Omaha sold and/or distributed to Giovanetti, Inc. ("Giovanetti") and which
12 were sold and/or offered for sale by Giovanetti in the State of California. All tape measures with
13 grips and hand straps containing lead are hereinafter referred to as the "Lead Products" and all
14 vinyl/PVC hand tool grips containing DEHP and/or lead and glue guns with vinyl/PVC cords
15 containing DEHP and/or lead are hereinafter referred to as the "DEHP/Lead Products." Lead
16 Products and DEHP/Lead Products are hereinafter referred to collectively as the "Products."

17 **1.6 Notices of Violation**

18 On February 1, 2011, Brimer served Omaha and certain requisite public enforcement
19 agencies with a 60-Day Notice of Violation ("Brimer Notice") that provided the recipients with
20 notice of alleged violations of Proposition 65 for failing to warn consumers that tape measures
21 with grips and hand straps exposed users in California to lead.

22 On November 9, 2012, Moore served Giovanetti and certain requisite public enforcement
23 agencies with a Supplemental 60-Day Notice of Violation ("Moore Notice") alleging that vinyl
24 tool grips including, but not limited to, the *Black & Sage Hi-Viz Hot Neon 6" Diagonal Pliers,*
25 *#807 (#7 04673 79807 2)* sold by Giovanetti exposes users to DEHP. For purposes of this
26 Consent Judgment, Omaha represents that it, or one of its affiliates, supplied Giovanetti with the
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1 product specifically referenced in the Moore Notice, the *Black & Sage Hi-Viz Hot Neon 6*"
2 *Diagonal Pliers* which was sold by Giovanetti in California.

3 On April 19, 2013, Brimer served Omaha, Giovanetti, and various public enforcement
4 agencies with a document entitled "Second Supplemental 60-Day Notice of Violation"
5 ("Supplemental Brimer Notice") that provided the recipients with notice of alleged violations of
6 Proposition 65 for failing to warn consumers that the Products exposed users in California to
7 lead and/or DEHP. The Brimer Notice, Moore Notice and Supplemental Brimer Notice are
8 hereinafter referred to as the Notices. To the best of the Parties' knowledge, no public enforcer
9 has commenced and is diligently prosecuting the allegations set forth in the Notices.

10 **1.7 Complaint**

11 On or about May 13, 2011, Brimer, who was and is acting in the interest of the general
12 public in California, filed a complaint in the Superior Court in and for the County of Alameda
13 against Omaha and Does 1 through 150, alleging, *inter alia*, violations of Proposition 65 based
14 on the alleged exposures to lead contained the Lead Products sold by Omaha in the State of
15 California. On or about February 13, 2014, Brimer filed a Second Amended Complaint
16 ("Complaint"), alleging additional violations of Proposition 65 against Omaha, including
17 unwarned exposures to lead and/or DEHP in the DEHP/Lead Products.

18 **1.8 No Admission**

19 Omaha denies the material, factual and legal allegations contained in the Notices and
20 Complaint. Nothing in this Consent Judgment shall be construed as an admission by Omaha of
21 any fact, finding, issue of law, or violation of law; nor shall compliance with this Consent
22 Judgment constitute or be construed as an admission by Omaha of any fact, finding, conclusion,
23 issue of law, or violation of law, such being specifically denied by Omaha. However, this
24 section shall not diminish or otherwise affect Omaha's obligations, responsibilities, and duties
25 under this Consent Judgment.

1 **1.9 Consent to Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
3 jurisdiction over Omaha as to the allegations contained in the Complaint, that venue is proper in
4 the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of
5 this Consent Judgment.

6 **1.10 Effective Date**

7 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date
8 this Consent Judgment is approved by the Court.

9 **2. INJUNCTIVE RELIEF: REFORMULATION**

10 As of the Effective Date, and continuing thereafter, Omaha shall (a) not manufacture,
11 distribute and/or ship for sale to Giovanetti any Products to be sold and/or offered for sale by
12 Giovanetti in California that are not “Reformulated Products;” or (b) shall cease sales of the
13 Products in California entirely. For purposes of this Consent Judgment Agreement,
14 “Reformulated Products” shall mean Products containing components that may be handled,
15 touched or mouthed by a consumer, and which components yield: (1) less than 1.0 microgram of
16 lead when using a wipe test pursuant to NIOSH Test Method 9100; (2) less than 100 parts per
17 million (“ppm”) lead when analyzed pursuant to EPA testing methodologies 3050B and 6010B,
18 or equivalent methodologies utilized by state or federal agencies for purposes of determining lead
19 content in a solid material; and (3) less than or equal to 1,000 ppm (0.1%) DEHP when analyzed
20 pursuant to EPA testing methodologies 3580A and 8270C, or equivalent methodologies utilized
21 by state or federal agencies for purposes of determining DEHP content in a solid material.

22 **3. MONETARY PAYMENTS**

23 In settlement of all claims referred to in this Consent Judgment, Omaha shall pay a total of
24 \$33,000 in civil penalties in accordance with this Section. Each penalty payment will be allocated
25 in accordance with California Health & Safety Code §§ 25249.12(c) & (d), with 75% of the funds
26 remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and
27 the remaining 25% of the penalty remitted to Brimer.

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1 **3.1 Initial Civil Penalty**

2 Omaha shall pay an initial civil penalty of \$10,000. Omaha shall issue a check in the
3 amount of \$10,000 to “Salisbury Law Group, Client Trust Account” to be held in trust for
4 OEHHA and Brimer within fifteen (15) days of the mutual execution of this Consent Judgment
5 by the Parties. Salisbury Law Group shall provide The Chanler Group with written confirmation
6 within five (5) days of receipt that the funds have been deposited in a trust account. Within two
7 (2) days of the Effective Date, Salisbury Law Group shall issue two separate checks for the
8 initial civil penalty payment to: (a) “OEHHA” in the amount of \$7,500; and (b) “Russell Brimer,
9 Client Trust Account” in the amount of \$2,500.

10 **3.2 Final Civil Penalty**

11 Omaha shall pay a final civil penalty of \$23,000 on or before May 15, 2015. The final
12 civil penalty shall be waived in its entirety, however, if, no later than May 1, 2015, an officer of
13 Omaha provides Brimer with written certification that, as of the date of such certification and
14 continuing into the future, Omaha has met the reformulation standard specified in Section 2.1
15 above, such that all Products manufactured, imported, distributed, sold and offered for sale in
16 California by Omaha are Reformulated Products. The certification in lieu of a final civil penalty
17 payment provided by this Section is a material term, and time is of the essence. In the event the
18 final civil penalty is not waived, Omaha shall issue two separate checks for its final civil penalty
19 payments to: (a) “OEHHA” in the amount of \$17,250; and (b) “Russell Brimer, Client Trust
20 Account” in the amount of \$5,750.

21 **3.3 Payment Procedures**

22 **3.3.1 Issuance of Payments.** Payments shall be delivered as follows:

23 (a) All payments owed to Brimer pursuant to Sections 3.1 and 3.2 shall be
24 delivered to the following payment address:

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

1 (b) All payments owed to OEHHA, pursuant to Sections 3.1 and 3.2, shall
2 be delivered to OEHHA (Memo line "Prop 65 Penalties") at the following addresses:

3 For United States Postal Service Delivery:

4 Mike Gyurics
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 P.O. Box 4010
8 Sacramento, CA 95812-4010

9 For Non-United States Postal Service Delivery:

10 Mike Gyurics
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 1001 I Street
14 Sacramento, CA 95814

15 With a copy of the checks payable to OEHHA mailed to The Chanler Group at the address
16 set forth above in 3.3.1(a), as proof of payment to OEHHA.

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

18 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
19 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
20 this fee issue to be resolved after the material terms of the agreement had been settled. Brimer
21 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms
22 had been finalized. The Parties then attempted to (and did) reach an accord on the compensation
23 due to Brimer and his counsel under general contract principles and the private attorney general
24 doctrine codified at California Code of Civil Procedure § 1021.5, for all work performed through
25 the mutual execution of this agreement. Omaha shall pay \$35,000 for fees and costs incurred as a
26 result of investigating, bringing this matter to Omaha' attention, and negotiating a settlement in
27 the public interest. Omaha shall issue a check payable to "Salisbury Law Group, Client Trust
28 Account" in the amount of \$35,000 within fifteen (15) days of the mutual execution of this
Consent Judgment by the Parties. Salisbury Law Group shall provide The Chanler Group with
written confirmation within five (5) days of receipt that the funds have been deposited in a trust
account. Within two (2) days of the Effective Date, Salisbury Law Group shall issue a check
payable to "The Chanler Group" to the address listed in Section 3.3.1(a) above.

1 **5. CLAIMS COVERED AND RELEASED**

2 **5.1 Brimer's Public Release of Proposition 65 Claims**

3 Brimer acting on his own behalf and in the public interest, releases Omaha, its parents,
4 subsidiaries, affiliated entities that are under common ownership, directors, officers, employees,
5 attorneys, and Omaha's downstream retailer, Giovanetti, from all claims for violations of
6 Proposition 65 based on exposure to lead in the Lead Products and DEHP and/or lead in the
7 DEHP/Lead Product which were distributed by Omaha specifically to Giovanetti and sold and/or
8 offered for sale by Giovanetti in the State of California before the Effective Date. Compliance
9 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect
10 to exposures to lead and/or DEHP in the Products.

11 **5.2 Brimer and Moore's Individual Release of Claims**

12 Brimer and Moore, in their individual capacity only and *not* in their representative
13 capacity, provide a release herein which shall be effective as a full and final accord and
14 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
15 damages, losses, claims, liabilities and demands of Brimer and Moore of any nature, character or
16 kind, whether known or unknown, suspected or unsuspected, limited to and arising out of any
17 violation of Proposition 65 regarding the failure to warn about exposure to lead and/or DEHP in
18 the Products which were distributed by Omaha specifically to Giovanetti and sold and/or offered
19 for sale by Giovanetti in the State of California before the Effective Date.

20 **5.3 Omaha's Release of Brimer and Moore**

21 Omaha on behalf of itself, its past and current agents, representatives, attorneys,
22 successors, and/or assignees, hereby waives any and all claims against Brimer and Moore and
23 their attorneys and other representatives, for any and all actions taken or statements made (or
24 those that could have been taken or made) by Brimer and Moore and their attorneys and other
25 representatives, whether in the course of investigating claims or otherwise seeking to enforce
26 Proposition 65 against it in this matter with respect to the Products.

1 **6. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the court and
3 shall be null and void if, for any reason, it is not approved and entered by the court within one
4 year after it has been fully executed by all Parties.

5 **7. SEVERABILITY**

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

9 **8. GOVERNING LAW**

10 The terms of this Consent Judgment shall be governed by the laws of the State of
11 California and apply within the State of California. In the event that Proposition 65 is repealed
12 or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then
13 Omaha may provide written notice to Brimer of any asserted change in the law, and shall have
14 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
15 the Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve
16 Omaha from any obligation to comply with any pertinent state or federal toxics control laws.

17 **9. NOTICES**

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

22 To Omaha:

23 Willis Woodring.
24 President
25 Omaha Distributing Co., Inc.
13737 Chandler Road
Omaha, NE 68138

To Brimer/Moore:

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

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1 With Copy to:

2 Lisa G. Salisbury
3 Salisbury Law Group
4 A Professional Law Corporation
5 3720 S. Susan Street, Suite #110
6 South Coast Metro, CA 92704

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

9 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

10 This Consent Judgment may be executed in counterparts and by facsimile or portable
11 document format (".pdf"), each of which shall be deemed an original, and all of which, when
12 taken together, shall constitute one and the same document. A facsimile or .pdf signature shall
13 be as valid as the original.

14 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

15 Brimer and Moore agree to comply with the reporting form requirements referenced in
16 California Health & Safety Code § 25249.7(f).

17 **12. POST EXECUTION ACTIVITIES**

18 The Parties further acknowledge that, pursuant to Health & Safety Code § 25249.7(f), a
19 noticed motion is required to obtain judicial approval of the settlement. In furtherance of
20 obtaining such approval, Brimer, Moore and Omaha agree to mutually employ their best efforts,
21 and that of their counsel, to support the entry of this agreement as a Consent Judgment, and to
22 obtain judicial approval of the settlement in a timely manner. For purposes of this Section, "best
23 efforts" shall include, at a minimum, cooperating on the drafting and filing of the necessary
24 moving papers, and supporting the motion for judicial approval.

25 **13. MODIFICATION**

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

1 **14. 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 **15. AUTHORIZATION**

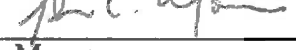
9 The undersigned are authorized to execute this Consent Judgment on behalf of their
10 respective parties and have read, understood, and agree to all of the terms and conditions of this
11 Consent Judgment.

12 AGREED TO:

13 Date: January 6, 2015

14
15 By: 
16 Russell Brimer

17
18 Date: JANUARY 5, 2014

19
20 By: 
21 John Moore

AGREED TO:

13 Date: Jan. 15, 2015

14
15 By: 
16 Omaha Distributing Co., Inc.