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9
10 Attorneys for Plaintiff
11 RUSSELL BRIMER

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SANTA CLARA - UNLIMITED CIVIL JURISDICTION

11 RUSSELL BRIMER,) Case No. 11-CV-201061
12)
13 Plaintiff,) **[PROPOSED] CONSENT**
14) **JUDGMENT**
15 v.)
16 FRANSHAW, INC.; and DOES 1 through 150,)
17 inclusive,)
18 Defendants.)
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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 Franshaw, Inc. (“Franshaw” 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 exposures 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, belts that expose users to lead, without first providing “clear and reasonable warnings”
17 under Proposition 65. Lead is listed as a reproductive and developmental toxicant pursuant to
18 Proposition 65 and is referred to hereinafter as the “Listed Chemical.” Belts containing lead are
19 referred to herein as the “Products.”

20 **1.5 Notice of Violation**

21 On February 24, 2011, Brimer served Defendant and various public enforcement agencies
22 with a document entitled “60-Day Notice of Violation” that provided public enforcers and
23 Defendant with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn
24 consumers that the Products that Defendant manufactured, distributed and/or sold exposed users
25 in California to lead.

26 **1.6 Complaint**

27 On May 17, 2011, Brimer, acting in the interest of the general public in California, filed
28 the instant action in the Superior Court for the County of Santa Clara, alleging violations of

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1 Health & Safety Code § 25249.6 based on the exposures to lead contained in Products
2 manufactured, distributed, and/or sold by Defendant (“Complaint”).

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
8 all Products it has manufactured, distributed and/or sold in California, including the Products,
9 have been, and are, in compliance with all applicable laws. Nothing in this Consent Judgment
10 shall be construed as an admission by Defendant of any fact, finding, conclusion, issue of law, or
11 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as
12 an admission by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such
13 being specifically denied by Defendant. However, this Section shall not diminish or otherwise
14 affect Defendant’s 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 Santa Clara, and that this Court has jurisdiction to enter and enforce the
19 provisions of this Consent Judgment.

20 **1.9 Effective Date**

21 For the purposes of this Consent Judgment, the term “Effective Date” shall mean August
22 15, 2011.

23 **2. INJUNCTIVE RELIEF: REFORMULATION**

24 **2.1** As of the Effective Date, Franshaw shall not purchase, import, manufacture, or
25 supply to an unaffiliated third party any Product that will be sold or offered for sale to consumers
Fran in California unless such Product contains no more than to 100 parts per million (“ppm”) of the
sha Listed Chemical when analyzed pursuant to Environmental Protection Agency testing
w methodologies 3050B and 6010B (“Digest Test”), or equivalent methodologies utilized by

1 federal or state agencies for the purpose of determining lead content in a solid substance.

2 **2.2** As of the Effective Date Franshaw shall not purchase, import, manufacture, or
3 supply to an unaffiliated third party any Product that will be sold or offered for sale to
4 consumers in California unless such Product contains no more than 100 ppm of the Listed
5 Chemical and yields no more than 1.0 micrograms per sample (“µg/s”) when any surface is
6 tested according to NIOSH 9100 testing methodology (“Wipe Test”) applied to the Products.

7 **3. PAYMENTS PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

8 In settlement of all the claims alleged by Brimer and referred to in the Notice, Complaint,
9 and this Consent Judgment, Franshaw shall make a payment of \$1,000.00 in civil penalties as
10 follows:

11 **3.1** Franshaw shall make payment of \$1,000.00 to be apportioned in accordance with
12 Health & Safety Code §§ 25249.12 (c)(1) & (d), with seventy-five percent of the penalty amount
13 remitted to the State of California’s Office of Environmental Health Hazard Assessment
14 (“OEHHA”) and the remaining twenty-five percent of the penalty paid to Brimer. Franshaw
15 shall issue two checks for the penalty payment: (a) one check made payable to “The Chanler
16 Group in Trust for OEHHA” in the amount of \$750.00; and (b) one check to “The Chanler
17 Group in Trust for Russell Brimer” in the amount of \$250.00. Two 1099 forms shall be
18 provided for the above payments, the first for California Office of Environmental Health Hazard
19 Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486), and the second for
20 Russell Brimer, whose address and tax identification number shall be furnished five days before
21 payment is due. The payments shall be delivered within 15 days of the Effective Date at the
22 address set forth in Section 3.4.

23 **3.2** All payments shall be delivered to the following address:

24 The Chanler Group
25 Attn: Proposition 65 Controller
26 2560 Ninth Street
27 Parker Plaza, Suite 214
28 Berkeley, CA 94710-2565

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

2 **4.1 Attorney Fees and Costs**

3 **4.1.1** The parties reached an accord on the compensation due to Brimer
4 and his counsel under general contract principles and the private attorney general doctrine
5 codified at California Code of Civil Procedure §1021.5, for all work performed through the
6 mutual execution of this agreement and approval by the trial court, excluding any fees on appeal.
7 Defendant shall pay Brimer and his counsel a total of \$28,500.00 for fees and costs incurred as a
8 result of investigating, bringing this matter to Defendant’s attention, and litigating and negotiating
9 a settlement in the public interest.

10 **4.1.2** The payment shall be issued in 6 separate payments of \$4,750, to be
11 made on August 20, 2011, September 20, 2011, October 20, 2011, November 20, 2011,
12 December 20, 2011 and January 20, 2012, made payable to “The Chanler Group” and shall be
13 delivered to Brimer’s counsel at the following address:

14 The Chanler Group
15 Attn: Proposition 65 Controller
16 2560 Ninth Street
17 Parker Plaza, Suite 214
18 Berkeley, CA 94710-2565

17 **5. CLAIMS COVERED AND RELEASE**

18 **5.1 Brimer’s Release of Defendant and its Chain of Distribution**

19 **5.1.1** This Consent Judgment is a full, final, and binding resolution
20 between Brimer, acting on behalf of himself and in the interest of the general public, and
21 Defendant, its owners, subsidiaries, affiliates, sister and related companies, employees,
22 shareholders, directors, insurers, attorneys, successors, and assigns (“Defendant Releasees”), and
23 all downstream entities to whom they directly or indirectly distribute or sell Products, including
24 but not limited to distributors, wholesalers, customers, retailers, franchisees, cooperative
25 members, and licensees (“Downstream Defendant Releasees”) of any violation of Proposition 65
Fran or any statutory or common law claim that has been or could have been asserted against
sha Defendant Releasees and Downstream Defendant Releasees individually or in the public interest
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1 regarding the failure to warn about exposure to the Listed Chemical arising in connection with
2 Products manufactured and/or shipped by Franshaw to an unaffiliated third party prior to the
3 Effective Date even if sold by Downstream Defendant Releasees after the Effective Date.
4 Defendant's compliance with this Consent Judgment shall constitute compliance with Proposition
5 65 with respect to the Listed Chemical in the Products for both Defendant Releasees and
6 Downstream Defendant Releasees.

7 **5.1.2** Brimer on behalf of himself, his past and current agents,
8 representatives, attorneys, successors, and/or assignees, and in the interest of the general public,
9 hereby waives with respect to the Products all rights to institute or participate in, directly or
10 indirectly, any form of legal action and releases all claims, including, without limitation, all
11 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages,
12 costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert
13 fees, and attorneys' fees) of any nature whatsoever (collectively "Claims"), against Defendant
14 Releasees and Downstream Defendant Releasees that arise under Proposition 65 or any other
15 statutory or common law claims that were or could have been asserted in the public interest,
16 limited to Claims related to Defendant Releasees' and Downstream Defendant Releasees' alleged
17 failure to warn about exposures to the Listed Chemical contained in the Products.

18 **5.1.3** Brimer, also on behalf of himself, his past and current agents,
19 representatives, attorneys, successors, and/or assignees and *not* in his representative capacity,
20 provides a general release herein which shall be effective as a full and final accord and
21 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
22 damages, losses, claims, liabilities and demands of any nature, character or kind, suspected or
23 unsuspected, against Defendant Releasees and Downstream Defendant Releasees arising under
24 Proposition 65, limited to claims related to Defendant Releasees' alleged failure to warn about
25 exposures to the Listed Chemical in the Products sold by Defendant Releasees. Brimer
Fran acknowledges that he is familiar with Section 1542 of the California Civil Code, which provides
sha as follows:

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

5 Brimer, in his individual capacity only and *not* in his representative capacity, and on behalf of
6 himself, his past and current agents, representatives, attorneys, successors, and/or assignees
7 expressly waives and relinquishes any and all rights and benefits which he may have under, or
8 which may be conferred on him by the provisions of Section 1542 of the California Civil Code as
9 well as under any other state or federal statute or common law principle of similar effect, to the
10 fullest extent that he may lawfully waive such rights or benefits pertaining to claims related to
11 Defendant Releasees' alleged failure to warn about exposures to the Listed Chemical in the
12 Products. In furtherance of such intention, the release hereby given shall be and remain in effect
13 as a full and complete release notwithstanding the discovery or existence of any such additional
14 or different claims or facts arising out of the released matters.

15 **5.1.4** Upon Court approval of the Consent Judgment, the Parties waive
16 their respective rights to a hearing or trial on the allegations of the Complaint. However, nothing
17 in this subsection shall limit or otherwise affect the Parties' rights to enforce the terms of this
18 Consent Judgment.

19 **5.1.5** The Parties further understand and agree that, except as provided
20 for above, this release shall not extend upstream to any third parties that manufactured the
21 Products or any component parts thereof, or any distributors or suppliers who sold the Products or
22 any component parts thereof to Defendant.

23 **5.2 Defendant's Release of Brimer**

24 **5.2.1** Defendant waives any and all claims against Brimer, his attorneys,
25 and other representatives for any and all actions taken or statements made (or those that could
26 have been taken or made) by Brimer and his attorneys and other representatives, whether in the
27 course of investigating claims or otherwise seeking enforcement of Proposition 65 against them in
28 this matter, and/or with respect to the Products.

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Defendant also provides a general release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Defendant of any nature, character or kind, known or unknown, suspected or unsuspected, arising out of the subject matter of the Complaint and the alleged failure to warn about exposures to the Listed Chemical in the Products. Defendant acknowledges that it is familiar with Section 1542 of the California Civil Code, which provides as follows:

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

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

6. SEVERABILITY

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

7. COURT APPROVAL

This Consent Judgment is not effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved and entered by the Court within nine months after it has been fully executed by all Parties. In the event this Consent Judgment is (a) not entered by this Court within nine months (or thereafter) of the Effective Date for any reason

1 whatsoever; or (b) is entered by the Court and subsequently overturned by any appellate court,
2 any monies that have been provided to Brimer or his counsel pursuant to Sections 3 and/or 4
3 aboveshall be refunded within fifteen (15) days after receiving a written demand from Defendant
4 requesting the return of such funds.

5 **8. GOVERNING LAW**

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

11 **9. NOTICES**

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

14 To Defendant:

15 Abraham Shamah, President
16 Franshaw, Inc.
17 112 West 34th Street, Suite 1515
18 New York, NY 10120

19 To Brimer:

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

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

27 **10. POST EXECUTION ACTIVITIES**

28 Brimer agrees to comply with the reporting form requirements referenced, in California
Health & Safety Code §25249.7(f). The parties acknowledge that, pursuant to Health & Safety
Code §25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment.
In furtherance of obtaining such approval, Brimer and Defendant, and their respective counsel

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1 agree to mutually employ their best efforts to support the entry of this agreement as a Consent
2 Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. For
3 purposes of this paragraph, "best efforts" shall include, at a minimum, cooperating on the drafting
4 and filing of any papers in support of the requisite motion for judicial approval.

5 **11. MODIFICATION**

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

9 **12. ENTIRE AGREEMENT**

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

16 **13. ATTORNEY'S FEES**

17 **13.1** A Party who unsuccessfully brings or contests an action arising out of this Consent
18 Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs
19 unless the unsuccessful Party has acted with substantial justification. For purposes of this
20 Consent Judgment, the term "substantial justification" shall carry the same meaning as used in the
21 Civil Discovery Act, Code of Civil Procedure § 2016.010 *et seq.*

22 **13.2** Except as specifically provided in the above paragraph and in Section 4.1 above,
23 each Party shall bear its own costs and attorney's fees in connection with this action.

24 **14. COUNTERPARTS, FACSIMILE SIGNATURES**

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

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1 **15. AUTHORIZATION**

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

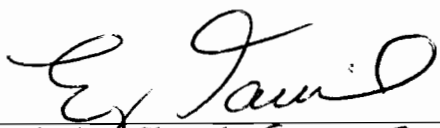
4
5 **AGREED TO:**

6 Date: 7-30-11

AGREED TO:

Date: 8-29-11

7
8 By:  _____
9 Plaintiff Russell Brimer


By: ~~Abraham Shamah~~ **EZRA TAWIL**
Its: ~~President~~ **VICE PRES.**
Franshaw Inc.

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